Privy Council Appeal No. 22 of 1997

(1) Alphonso Tracey and (2) Andrew Downer *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 20th July 1998

Present at the hearing:-

Lord Slynn of Hadley
Lord Lloyd of Berwick
Lord Steyn
Lord Clyde
Lord Hutton

*[Majority Judgment Delivered by **Lord Lloyd of Berwick**]*

In the early morning of 4th March 1991 Kenneth McNeil was shot and killed while carrying out his duties as the driver of a security van in Kingston, Jamaica. The van was parked outside the Jamaica Citizens Bank, on the corner of Port Royal Street and King Street. A fellow employee, Christian Riley, had gone to the night safe at the side of the bank to collect two bags which he placed in the van. He was being covered by Mr. McNeil. Both men were armed. Mr. Riley noticed a white car approaching from the opposite direction. There was a shot. Mr. Riley returned fire. This was followed by a barrage of fire from the car. After exhausting his ammunition, Mr. Riley ran eastwards along Port Royal Street. He was hit twice, and fell. As he looked back he saw two men firing at Mr. McNeil on the sidewalk. He was able to get the registration number of the car. He later identified the two men as the appellants, Tracey and

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Downer. When a police officer later examined the van, he found the bags had gone. The van was empty.

The trial of the appellants commenced on 14th December 1994. They were charged with capital murder, the particulars being:-

> "Alphonso Tracey and Andrew Downer on the 4th day of March 1991 in the parish of Kingston murdered Kenneth McNeil, in the course of or furtherance of an act of terrorism."

On 19th December the indictment was amended so as to add to the particulars "and in the course and furtherance of a robbery".

Downer was represented by Lord Gifford Q.C. and Tracey by Mr. Morris. Neither of the appellants gave evidence, or called any witnesses. In unsworn statements from the dock they asserted their innocence.

The principal witness for the prosecution was Mr. Riley. At the end of the prosecution case there were submissions of no case to answer on the ground that Mr. Riley's identification evidence was weak and unsupported. The judge rejected these submissions. In due course both appellants were convicted and sentenced to death.

There were three main grounds of appeal. The first was that the judge ought to have upheld the submissions of no case to answer. Secondly the judge did not draw sufficient attention to the weaknesses in Mr. Riley's identification evidence. Thirdly the application to amend the indictment, and the submissions of no case to answer, ought not to have been heard in the presence of the jury.

The Court of Appeal dealt fully and effectively with these three grounds of appeal. In so far as these grounds have been renewed before the Board, their Lordships see no reason to add to what was said by the Court of Appeal. The court referred to the recent decision of the Board in *Crosdale v. The Queen* [1995] 1 W.L.R. 864 in which Lord Steyn, giving the judgment of the Board, said that the jury should be invited to withdraw during a submission of no case to answer, in order to avoid any risk of

prejudice. The Court of Appeal held that there was in fact no prejudice in the present case. Their Lordships agree, and note in passing that Lord Gifford himself invited the court to allow the jury to remain.

As so often happens, the two points on which the appellants now rely were not argued before the Court of Appeal. The first point concerns the amendment of the indictment. Section 2 of the Offences Against the Person Act provides:-

> "(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say -
>
> ...
>
> (d) any murder committed by a person in the course or furtherance of -
>
> (i) robbery;
> ...
>
> (f) any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public.
>
> (2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it.
>
> ...

(4) Where it is alleged that a person accused of murder is guilty of capital murder, the offence shall be charged as capital murder in the indictment."

Section 6(1) of the Indictments Act provides:-

> "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, ..."

When the trial started the sole allegation of capital murder was, as already mentioned, that the murder was in the course or furtherance of an act of terrorism. It was only after Mr. Riley had completed his evidence on Friday, 16th December, that counsel applied "in an abundance of caution" to amend the indictment. This was on the morning of Monday, 19th December.

The application to amend was opposed on the ground that the prosecution ought to have decided what their case was before the trial began. By the fourth day of the trial it was too late to amend. According to Lord Gifford the defence had been "irretrievably prejudiced". He said that he had been taken totally by surprise. There were questions which he would have put to Mr. Riley if it had been alleged that the murder took place in the course of a robbery.

Lord Gifford referred to two cases in the Court of Appeal of Jamaica, namely, *Reg. v. Simpson* (unreported, 9th May 1994; Supreme Court Criminal Appeal No. 105 of 1992) and *Reg. v. McKain* (unreported 31st October 1994; Supreme Court Criminal Appeal No. 106 of 1993) in both of which he had appeared for the appellants, and in both of which an appeal against capital murder was allowed. Nevertheless the judge held in the instant case that there was no prejudice in allowing the amendment. He offered Lord Gifford a short adjournment to consider whether he wished to have Mr. Riley recalled. But in the

event Lord Gifford made no application, and the trial proceeded.

In the Court of Appeal the point was raised by paragraph 2 of Tracey's grounds of appeal, and paragraph 9 of Downer's grounds of appeal. But it does not appear to have been at the centre of the argument. The only ground argued in Tracey's appeal, as appears from the court's judgment was the procedural point whether the application to amend should have been heard in the presence of the jury, not the substantive point whether leave to amend should have been given. Thus paragraph 2 of the grounds of appeal seems to have been abandoned. In those circumstances the Board would be very reluctant to interfere with the discretion of the trial judge, especially as his view that there was no prejudice seems to have been accepted by the Court of Appeal.

However their Lordships do not wish to condone late applications to amend particulars in capital murder cases. In the present case it must have been obvious to the prosecution from the start that the murder took place in the course or furtherance of a robbery, and no satisfactory explanation was afforded as to why it was not so pleaded. But the fact that it must have been obvious to the prosecution means also that it must have been obvious to the defence. The only element of surprise can have been that the prosecution did not amend the indictment before the trial began.

It was argued by Mr. Andrew Nicol Q.C. for Tracey that it may not have been so obvious that the murder was in the course of a robbery. It was possible that the murder was motivated by revenge, and that the missing bags were removed from the back of the van by police officers. But this could hardly be more far-fetched. The circumstances all point to this being a planned attack on security guards in the course of their daily round. The fact, if it be the fact, that the bags collected from the Jamaica Citizens Bank contained documents, and not money, does not mean that it was not a murder in the course of a robbery.

Then was the judge right to hold that there was no prejudice to the appellants in allowing the amendment? Mr. Alun Jones Q.C. for Downer pointed out that the

words used in section 6(1) of the Indictments Act were "without injustice" not "without prejudice". But the two words come to the same thing.

In support of their argument that the appellants were prejudiced, Mr. Nicol and Mr. Alun Jones relied on an affidavit sworn by Lord Gifford, in which he refers to the questions he might have asked if the allegation had been that the murder was in the course of a robbery, as well as in the course of an act of terrorism. But their Lordships were not impressed. In any event if there was any real risk of prejudice, Lord Gifford could have applied to recall Mr. Riley. The reason given for not doing so was that Mr. Riley would have known why he was being recalled, and would have tailored his answers accordingly. But in their Lordships' view another reason must have been that there was nothing Lord Gifford could have asked to throw any doubt on the obvious conclusion that the murder was in the course or furtherance of a robbery. Although their Lordships accept that Lord Gifford was in a difficult position and deplore the late amendment, the appellants suffered no prejudice. The late amendment therefore affords no ground for allowing the appeal or for reducing the verdict from capital murder to murder.

As for the two authorities relied on by the appellants, they are of no assistance. In *Simpson* there was no allegation of capital murder at all until the amendment on the fifth day of the trial. The inference of prejudice was, as the Court of Appeal held, irresistible. In *McKain* the charge was capital murder from the start. But there were no proper particulars. The prosecution conceded that in the absence of particulars, the case ought not to have been left to the jury. So again the decision does not help.

The second main ground of appeal turns on section 2(2) of the Offences Against the Person Act. Mr. Nicol relied on the reasoning of the Board in *Daley v. The Queen* [1998] 1 W.L.R. 494, and in particular on the following passage at page 502 from the judgment of the Board delivered by Lord Hope of Craighead:-

> "Their Lordships wish to stress that it is necessary for the trial judge, in the case of each of the categories of murder referred to in subsection (1) of

> section 2 of the principal Act, as amended, except that of the kind referred to in paragraph (e) of that subsection, where two or more persons are found guilty of the murder, to give a direction about the application to the case of section 2(2) of that Act. It is not enough in such a case to give directions as to whether or not the murder was committed in the circumstances which would make it capital murder as set out in sub-section (1). The jury must reach a separate verdict for each defendant on the question whether the murder he committed was capital murder or non-capital murder. That cannot be done without applying to his case the provisions of section 2(2)."

If the evidence was that both men were firing at the deceased, then Mr. Nicol conceded that the requirements of section 2(2) were satisfied. They were each "attempting to inflict grievous bodily harm" on Mr. McNeil. It would matter not which of them fired the fatal shot. But if the evidence was that only one of the appellants was firing at Mr. McNeil, then the judge ought to have given a direction in accordance with section 2(2).

It is regrettable that this point was not taken in the Court of Appeal. No doubt the explanation is that the point under section 2(2) only came to prominence as a result of the decision of the Board in *Daley*.

How then does the case stand on the evidence? Was Mr. Riley's evidence that both men were firing at Mr. McNeil, or only one? In chief he said that both men had guns. One came round the front of the van, the other round the back. Mr. McNeil was between them on the sidewalk. Their guns were similar. A little later he was asked:-

> "Q. Now, when you saw these men come around from the car on to the sidewalk and sandwiched Mr. McNeil, what was the next thing that happened?
>
> A. He was pointing the firearm that he was carrying towards Mr. McNeil and I heard a barrage, another barrage of shots fire at Mr. McNeil."

If the evidence had stopped short at that point, it might not have been clear that both men were firing. But in cross-examination by Mr. Morris, Mr. Riley was asked:-

"Q. After the men had sandwiched Mr. McNeil and were firing at him with two long guns, you call them M-16, you looked away and you did not see what became of Mr. McNeil. Is that correct?

A. Yes, sir.

Q. So the last time you saw him he was sandwiched between two men who were firing at him with M-16 correct?

A. Yes, sir."

A little later he was asked:-

"Q. At the front of the van between the van and the bank wall was a man with an M-16 pointing at Mr. McNeil?

A. Correct, sir.

...

Q. Was the person at the back firing at Mr. McNeil or he was not firing?

A. He was firing, sir.

Q. Right. Where he was firing at Mr. McNeil was he somewhere between the side of the van and the side of the bank wall? Was he somewhere there?

A. He was more to the back of the van, sir.

...

Q. The man at the back of the van, was he firing at Mr. McNeil, sir?

A. Yes, sir.

Q. Was he firing through the van at Mr. McNeil?

A. No, sir.

Q. Was he aiming his gun at Mr. McNeil, sir?

A. Yes, sir.

...

Q. So you have both men aiming their M-16 at Mr. McNeil; correct?

A. Yes, sir.

...

Q. And both men were letting off a barrage of shots at Mr. McNeil; is that correct, sir?

A. Yes, sir.

Q. How long did this firing by both men - let me put it this way: When you looked away while you were on the ground you saw these men firing. How long did you hear the barrage of shots from the men when they were firing at Mr. McNeil between the van and the bank wall?"

The witness then gave an estimate of three to four seconds. Then in cross-examination by Lord Gifford Mr. Riley was asked whether the man at the back of the van was firing at Mr. McNeil. Mr. Riley replied that he was.

So there was no issue at the trial that the two men, whoever they were, were both firing. The issue was whether Mr. Riley was in a position where he could identify the men as the appellants. If both men were firing at Mr. McNeil, then, as their Lordships have already said, it was conceded that they would both be guilty of capital murder.

Before their Lordships an attempt was made to cast doubt on Mr. Riley's evidence. It was pointed out that according to the evidence of Detective Corporal Henry seventeen spent M-16 cartridge cases were recovered from

the road just ahead of the van, and seven nine millimetre cases were also found ahead of the van. In addition there were six .38 inch casings. Since all the casings, except the .38, were found ahead of the van, it was argued that Mr. Riley must have been wrong when he said that one of the men was firing from the back of the van. He must also, it is said, have been wrong in another respect. For in the course of the hearing Mr. Nicol obtained a copy of the ballistic report of Mr. Dan Wray, which confirmed that the seventeen M-16 bullets were all fired from the same rifle. This shows that the appellants cannot both have had similar long barrel guns. If both were firing, one of them must have been using a hand gun discharging nine millimetre or .38 inch ammunition.

If these matters had been investigated at the trial, they might have called for an answer by the prosecution. But they were not. Detective Corporal Henry was cross-examined at length by Mr. Morris on the afternoon of 19th December. The defence had been in possession of Mr. Wray's ballistic report since the morning of 19th December, when the prosecution served formal notice to adduce the report in evidence. But neither Mr. Wray (who was in court) nor Detective Corporal Henry were asked any questions in cross-examination about where the spent cartridge cases were found, nor from what guns they must have been fired. No doubt this was because it was not in issue that both men were firing. Indeed the only questions on the point were put not to Detective Corporal Henry, but to Mr. Riley himself, when he was asked whether, if Mr. Riley was right that two men were firing a barrage of shots, it came as a surprise to him that Mr. McNeil was only hit once; to which Mr. Riley gave the robust answer that a person can miss, especially if he is not well trained.

Their Lordships turn now to the summing up. There were two main criticisms. The first is that the judge confused the jury by giving them a direction on joint enterprise whereas he should have confined his remarks to section 2(2) of the Act. The second is that the judge directed the jury that both men were shooting, thereby withdrawing a vital issue from the jury contrary to the principle stated in *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55.

The first criticism is misplaced. This being a capital murder charge, the first stage was for the prosecution to bring the case within one or other of the paragraphs of section 2(1) of the Act. Only then does section 2(2) become relevant.

As for section 2(1) the prosecution were obliged to rely on joint enterprise to prove a killing in the furtherance of robbery. In the course of his summing up the judge said:-

> "The evidence of the common design to kill in furtherance of the robbery, if you accept it, is that two men came out of a car and trapped McNeil, one of the security guards, these men being each armed with high-powered rifles shooting at him. ... So if you accept that, if you accept the fact that the common design was there to rob, then you may say yes, the killing, whoever did it, was done in furtherance of the robbery."

In their Lordships' view that was an accurate and necessary direction.

As for section 2(2) the judge directed the jury at the end of the summing up as follows:-

> "And let me tell you the possible verdicts that you can look at here. One, in relation to Tracey, if you find that Alphonso Tracey was present on the scene on the 4th of March, 1991 and that he was there in pursuit of a common design to rob and in furtherance thereof he was violent to the deceased by firing at him, you may find him guilty of capital murder."

That sentence contains in concise form all the ingredients of the capital murder offence, namely, (i) the killing of the deceased; (ii) common design to rob and (iii) the attempt to inflict grievous bodily harm on the person murdered.

The judge then put the matter the other way round:-

> "If you do not find that he was in the course or furtherance of robbery or you are not sure, you cannot say he is guilty of capital murder. If you find that Tracey was present on the 4th March, 1991 in

> pursuit of a common design to murder and he was there in concert with another firing at the deceased, you may find him only guilty of non-capital murder."

In these sentences the judge made clear that in the absence of a common design to rob, the appellant could not be found guilty of capital murder.

Finally, in a further sentence, the judge said:-

> "If you do not find that he was there firing any gun at McNeil or if you are not sure, you can't find him guilty of anything. You have to acquit."

This last sentence may be too favourable to the accused; for if the appellant was there in pursuance of a common design to murder, but not firing himself, he could have been found guilty of non-capital murder. Be that as it may, the jury must at least have understood that, in order to find the appellant guilty of capital murder, they must first be sure that he was actually firing.

The judge then repeated the same direction, in similar language, in the case of Downer. So the jury heard the same direction twice immediately before they retired. They can hardly have been in any doubt as to the meaning.

As for the second criticism, their Lordships are unable to understand what is the issue which is said to have been withdrawn from the jury. The evidence of Mr. Riley in cross-examination was that two men came out of the car, and both were firing. This was never challenged. Nevertheless in the passage already quoted from the summing up the judge rightly left it to the jury to decide whether they accepted that evidence or not. Elsewhere in the summing up the judge referred to the evidence that there were two men firing. It was not necessary for him to qualify his language on each occasion (although he sometimes did) by adding "if you accept it". Nowhere does the judge come near to directing the jury that both of the gunmen had fired.

In summary the judge was right to remind the jury of Mr. Riley's evidence that two men were firing at Mr.

McNeil. If the jury accepted that evidence (as to which there was no issue) and accepted also Mr. Riley's identification of the appellants, then it was conceded that the appellants cannot rely on section 2(2) by way of defence. If, in the circumstances of the present case, a specific direction on section 2(2) was required at all then the direction at the end of the summing up was adequate.

Their Lordships will humbly advise Her Majesty that these appeals ought to be dismissed.

Dissenting judgment prepared by ***Lord Slynn of Hadley and Lord Steyn***

In our judgment the appeal should be allowed to the extent of substituting in the cases of both appellants verdicts of non-capital murder with the result that the cases of the two men ought to be remitted to the Court of Appeal to pass custodial sentences for non-capital murder. The reason for our dissent is the conviction that the verdicts of capital murder, as opposed to murder, were secured by departures from minimum standards of criminal procedure. Our reasons can be stated quite briefly.

The application to amend the indictment

Only on the fourth day of the trial after the single eyewitness had completed his evidence did the Crown apply to amend the indictment to assert that the murder was committed during the course of a robbery. The majority observe that "their Lordships accept that Lord Gifford [who appeared for one of the men at trial] was in a difficult position and deplore the late amendment". We are afraid we have to say that defence counsel were put in an impossible position. The application to amend should have been made in the absence of the jury. That is obvious from the principles set out in *Crosdale v. The Queen* [1995] 1 W.L.R. 864 and *Mitchell v. The Queen* [1998] 2 W.L.R. 839. The jury had no legitimate interest in hearing that part of the proceedings. And their presence created the risk of prejudice to the defendants. No explanation for this irregularity has been given. It was potentially capable of causing prejudice to the defendants.

Indeed Lord Gifford said to the judge that if robbery had been an issue "I would have asked him [Mr. Riley] certain questions. I am not going to tell the court what they are". Lord Gifford has sworn an affidavit two years after the trial, without sight of trial transcripts, as to how he might have conducted the trial if he had had notice of the robbery allegation. But for our part we are not willing to dismiss entirely Lord Gifford's statement that, if he had had notice of the robbery allegation, he would have asked questions about the actions of the security guards and the whereabouts of the money bags. But it is unfair to judge the matter in this way: the defendants were prejudiced in regard to the application for an amendment because the presence of the jury prevented their counsel from explaining how they would have conducted the trial if proper notice had been given of the robbery allegation.

Further the judge materially misdirected himself in regard to the application. He was wrong to say that it was "not a new charge" and only new "evidential material" was involved. After all, the purpose and effect of the amendment was to place the defendants in jeopardy of their lives on an entirely new statutory ground. It was a change in the Crown's position at an unprecedently late stage in a most fundamental sense. If the judge had so approached the matter, he might have come to a different conclusion. Moreover, in exercising his discretion, the judge failed to take into account the deplorable delay of the Crown in applying for the amendment. Had he taken this factor into account he would have been entitled on this ground alone to reject the application.

On these grounds we conclude that the judge's decision to allow the amendment ought as a matter of justice not to be allowed to stand. The consequence is that the appeals ought to succeed to the extent of substituting verdicts of non-capital murder.

The judge's direction on the triggerman test

Having allowed the amendment, it became an issue in the case whether the motive of the killing was robbery and whether the "triggerman" test contained in section 2(2) of the Offences Act Against the Person was satisfied to the requisite standard of proof. That required a careful

direction in accordance with the judgment of the Privy Council in *Daley v. The Queen* [1998] 1 W.L.R. 494. Whatever the state of the evidence, and whatever the nature of cross-examination by counsel for the defendants before the amendment was made, it was for the jury to decide whether they accepted the evidence of the witness; whether they rejected it; or more likely whether they generally accepted it but not in all respects. In particular it was for the jury to decide whether two men fired at the deceased. Theoretically there could have been a formal admission by counsel that the "triggerman" test was satisfied but there was none. It therefore remained throughout an issue whether the test was satisfied and the defendants were entitled, as a matter of law, to the verdict of a properly directed jury on that issue.

The judge's directions on this issue were wholly insufficient. He repeatedly directed the jury on joint enterprise. That was acceptable in order to set the scene for the issue of robbery. But the judge's concentration on this issue required him to make clear to the jury that, even if they were satisfied on joint enterprise to rob, that did not satisfy the "triggerman" test. The judge never said that expressly.

The judge only dealt with this critical issue at the end of his summing up when he came to explain what verdicts were open to the jury. He said:-

> "And let me tell you the possible verdicts that you can look at here. One, in relation to Tracey, if you find that Alphanso Tracey was present on the scene on the 4th of March, 1991 and that he was there in pursuit of a common design to rob and in furtherance thereof he was violent to the deceased by firing at him, you may find him guilty of capital murder. If you do not find that he was in the course or furtherance of robbery or you are not sure, you cannot say he is guilty of capital murder. If you find that Tracey was present on the 4th of March, 1991 in pursuit of a common design to murder and he was there in concert with another firing at the deceased, you may find him only guilty of non-capital murder. If you do not find that he was there firing any gun at McNeil or if you are not sure, you can't find him guilty of anything. You have to acquit.

> In relation to Downer, if you find that Andrew Downer was there on the 4th of March, 1991 and that he was there in pursuit of a common design to rob and in furtherance thereof he was violent to McNeil by firing at him to his death, you may find him guilty of capital murder. If you do not find him being present in the course of robbery albeit there in the common design but not in the course of the robbery, but killing or you are not sure, you cannot say that he is guilty of capital murder. If you find that Downer was present on the 4th of March in pursuit of a common design to murder and he was there in concert with another firing at him to his death, you may find him only guilty of non-capital murder. If you do not find that he was there firing any gun or doing anything at all, you can't find him guilty of anything. And that is so equally if you are not sure. So those are the possible verdicts that you can find."

The interpretation of this part of the summing up took up a great deal of time at the hearing of the appeals. In our view the jury would have had difficulty in grasping what the judge meant. Moreover, the judge gave no warning that a finding of joint enterprise is not enough to justify a verdict of capital murder. And there is not even a clear direction that it is only if they found that both defendants fired at the deceased that they could find capital murder established. And these were matters upon which the defendants were entitled to have the verdict of a properly directed jury. In our view the judge misdirected the jury on this aspect.

Once it is accepted that there was a misdirection on so fundamental a matter, the conclusion cannot be avoided that there was a substantial risk that the jury did not properly consider the critical issue. On this ground too the appeal ought to be allowed.

The ballistics report

At the hearing of the appeal a ballistics report was by consent placed before the Board. The majority have observed that if matters arising from the report "had been investigated at the trial, they might have called for an

answer by the prosecution. But they were not". On the basis of that report counsel for the appellants was able to mount a strongly arguable case that both men did not fire at the deceased. If this scientific case had been deployed before the jury, the jury might have returned verdicts of non-capital murder. But counsel appearing for the appellants at the trial plainly did not appreciate the importance of the report. Taking into account that a prosecuting counsel is a minister of justice we are willing to accept that she did not appreciate the significance of the report. And there is no reason to think that the trial judge appreciated it. In these circumstances the verdicts of capital murder are not safe. On this ground there should at the very least be a retrial. But we would go further. The prosecution only served the ballistics report on Monday, 19th December 1994, i.e. on the very day that the prosecution applied for and obtained the amendment. Until the amendment was granted the ballistics report was of little significance. For our part we would not blame counsel for the defence for not appreciating the significance of a scientific report produced at such a late stage. The opportunity to consider the report was minimal: on 19th December the prosecution case ended; the next day the defence cases started and on 21st December 1994 the judge summed up. It was casual in the extreme of the prosecution to produce a report of such importance so late in the day. But it fits in with the delay in applying for the amendment.

For our part the ballistics report reinforces our view that the appellants were prejudiced by the way the prosecution proceeded and the judge misdirected the jury.

The judge's prejudicial comments

In dealing with the evidence of the eye witness the judge made the following observations:-

> "All these things you have to take into consideration because if you take this to its logical end - you have not got to take it from me but I am putting it to you - any person who is shot in criminal circumstances, all the criminal would have to do is to shoot him and gone, safe in the knowledge that he could not be identified. It is a matter for you; ... Put yourselves in

> the circumstances and see if this is correct, this thing about identification and all that is correct. Nobody could be identified in a case where there was a robbery, and there was shooting and all that. Couldn't be. It is a matter for you, though. Remember, however, he told us that he was frightened, so you have to balance all these things."

Later he added:-

> "He said he was frightened, but you must consider whether fright in that sense means that he was frightened to the extent that he could not properly identify persons. Of course, when you see M-16 barking around you ..., of course you are going to be frightened and it is because you are frightened you can't identify? Then all these people would get away; perpetrators of crime in such circumstances would get away." (Our emphasis added)

These observations ought never to have been made. Whatever the judge's intentions might have been his observations might have generated in the jurors' minds a bias against the defendants. It is true that those observations were made in the context of a different issue, viz. identification. But once this kind of insinuation is made to the jury, the extent of its effect cannot neatly be calculated. It may be pervasive and extend to all issues in a case. This too was a material irregularity in the trial.

This ground reinforces our view that the verdicts of capital murder ought to be quashed.

Conclusion

We would humbly recommend to Her Majesty that the appeals ought to be allowed to the extent we have indicated.