Privy Council Appeals Nos. 43 of 1996, 12 of 1996 and 63 of 1996

1. (1) Kervin Williams and (2) Melbourne Banks
2. Zephaniah Hamilton and
3. Junior Leslie *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 16th April 1997

Present at the hearing:-

Lord Goff of Chieveley
Lord Mustill
Lord Lloyd of Berwick
Lord Steyn
Lord Hutton

*[Delivered by **Lord Hutton**]*

There are four appeals before their Lordships by persons convicted of murders in Jamaica and sentenced to death at trials which took place prior to the commencement of the Offences against the Person (Amendment) Act 1992 ("the 1992 Act"). The appeals of Kervin Williams, Melbourne Banks and Zephaniah Hamilton fall into two parts. In the first part each of them appeals from a decision of the Court of Appeal of Jamaica refusing his application for leave to appeal against conviction. In the second part the three appellants each contend that under the review procedure laid down by section 7 of the 1992 Act it was unlawful for the determination to be made that sentence of death was warranted having regard to the provisions of section 3(1A) of the Offences against the Person Act 1864 ("the 1864 Act") as amended by the 1992 Act (which provisions are colloquially known as "the double murder rule").

In addition Banks contends that the three judges of the Court of Appeal who carried out the review procedure were in error in classifiying the two murders of which he had been convicted as capital murders.

The fourth appellant, Junior Leslie, was refused leave to appeal against the decision of the Court of Appeal of Jamaica refusing his application for leave to appeal against conviction, but in his appeal before their Lordships he also contends that under the review procedure it was unlawful for the three judges of the Court of Appeal to determine that sentence of death was warranted having regard to the provisions of section 3(1A) of the 1864 Act.

In this judgment their Lordships will consider first the appeals against conviction of Kervin Williams and Melbourne Banks, who were co-defendants, then the appeal against conviction of Zephaniah Hamilton and, in conclusion, their Lordships will consider the submissions of the four appellants in respect of the review procedure under section 7 of the 1992 Act.

The appeals against conviction of Kervin Williams and Melbourne Banks.

On the morning of Monday, 25th March 1991 Keith Ramtallie, a middle aged man, and his mother Evelyn Ramtallie were found dead in their home in Saint Andrew, Jamaica. Their throats had been cut. It appeared that Keith Ramtallie had been wounded in the laundry room of the house and had made his way to the rear garden where he collapsed and died. The body of Evelyn Ramtallie was found sitting in a rocking chair in the dining room.

The appellant Banks was arrested about 8.30 p.m. on 25th March 1991 and the appellant Williams was arrested about 4.30 a.m. on 26th March 1991. The trial of the appellants for the murders of Keith Ramtallie and Evelyn Ramtallie took place before Panton J. and a jury in March 1992. The principal evidence against both appellants consisted of statements made by them to the police. The evidence for the prosecution was as follows. Deputy Superintendent Hewitt spoke to Williams in the presence of Banks about 6.00 a.m. on 26th March. The Deputy Superintendent told Williams that he was investigating the double murder of Keith Ramtallie and Evelyn Ramtallie and wished to ask him questions about it. Immediately Williams pointed to Banks and said words to the effect "Ah dah bwoy deh carry mi round deh goh kill the people dem, sah". Banks remained silent.

Later on 26th March at 7.40 a.m. in the presence of a justice of the peace and after caution Williams made a written statement to Detective Inspector Chin.

Williams commenced the statement by saying that on the morning of 25th March after 5.00 a.m. Banks (to whom he referred in the statement as "Bones") came to him and told him that he wanted him to go with him to collect his pay. The two of them went by bus to Constant Spring where they got off the bus and walked to Norbrook. The statement then continued:-

> "Bones tell me say me must stand up outside when me reach there and him tell me seh him soon come and him go inside. When Bones go inside me hear him and him boss a talk a quarrel and me hear him boss tell him seh him fire him from Friday. After that me hear him boss scream out.
>
> Me go inside a de yard after him boss scream out and me see him lie down pon de ground wid him throat cut, slice round and me see Bones a go in a de room wid one middle size kitchen knife wid blood pon it and him tell me seh me must go back outside. Me go back outside a de back gate. Me did go a de back gate when me go deh and him go a de front.
>
> Me go back inside the yard after about five minutes because every move him make him send me a de gate fe go watch see if anybody a come.
>
> Me go in a de house after me go back in a de yard and me see the lady in a chair lean back with her throat cut and Bones upstairs a search with the knife in a him hand.
>
> Me and Bones go outside and him tell me fe pass a knapsack bag weh him did carry deh and left it outside, a black bag. Me pass de bag give Bones and him go inside wid it and ... him put him shirt in it and give me but it have more things in deh because it never flat like when me give him but me no see what else him put in deh."

The statement continued with Williams describing how he and Banks then went by bus to Bull Bay to the house of a young woman. They told the young woman to wash their clothes because there was blood on them. They then lay down on a bed and went to sleep for some time. Later they put on their clothes after they had dried and they travelled by bus to Halfway Tree where Williams left Banks. Williams said at the end of the statement that he had forgotten to say that when he and Banks reached Bull Bay, before they went into the house of the young woman, Banks took five hundred dollars out of a purse and gave them to Williams saying "Dat a my cut".

After he had made the written statement Williams was visibly upset, quarrelling with himself and saying "the ole mad bwoy

call me fe mek we go kill off de people dem". Later on 26th March about 5.00 p.m. both Williams and Banks were taken to a doctor, Dr. Ford, for the taking of blood samples and samples from their nails. According to Dr. Ford Williams said to him, referring to Banks, "This idiot boy carry me and get me in trouble".

About 6.45 a.m. on 26th March Inspector Asphall told Banks that he was a prime suspect in the murders of the Ramtallies and Banks said "Mi going to tell you my side of the story". Later on 26th March at 8.45 a.m. in the presence of Detective Sergeant Wallace and after caution Banks made a written statement to Detective Assistant Superintendent Howell. The statement commenced with Banks describing how he had worked for Mr. Ramtallie at his house for a period of about a year and two months doing gardening and other work. He then described how on the morning of 25th March 1991 he and two other men, whom he named as "Lloyd" and "Omar", went to Mr. Ramtallie's house and went into the garden of the house. He stated that he then went into the bathroom and started to change. The statement then continued:-

> "When I go in the bathroom and start change I hear a noise outside like somebody choking. When me come outside me see Lloyd and Omar hold down Mr. Ramtallie a ground beside the shed. Me say, 'A what the man dem do?' And Lloyd say to me, 'Come gi him a cut', and him say if mi don't gi him a cut them a go beat me up and cut me up and leff me in a de yard; him neck did cut a ready. Lloyd and Omar have knife in them hand. Me take way Omar knife and mi gi the boss one stab a him belly and mi rip it with the knife. Them say come mek we go in the house fi Granny. When we go in dey we see Grannie sit down in a de the chair in the hall, and Omar said to me, 'Hold him hand, man, do something'. And me hold one a her hand. Omar hold back her head and cut her throat with him knife? That time Lloyd a search the house. After that dem dig up in a Grannie room then them run upstairs. Me just stand like mi knock out. Me see Omar come with Mr. Ramtallie black pouch. Omar said, 'Lloyd, unoo come, me find whey mi fi find.' Me come out through the front gate."

The statement continued with Banks describing how Omar said he had only got three hundred dollars and Omar gave him one hundred dollars. He and Omar then went to Bull Bay where Omar asked a woman called Camille to wash their clothes. They waited until the clothes were dry and had a sleep. They then left about four o'clock.

There was also some circumstantial evidence against the appellants. On the afternoon of Friday, 22nd March 1991 a domestic help in Mr. Ramtallie's house heard Banks grumbling about the low wages he was being paid by Mr. Ramtallie and also complaining that another domestic help in the house named Marcia Brooks, who was a friend of his, had been dismissed by Mr. Ramtallie because of his relationship with her. Banks had been wearing a yellow vest when he was working at Mr. Ramtallie's house on Friday, 22nd March and was wearing that vest when he left the house on that day. Banks did not work in the house on 23rd and 24th March, but his yellow vest was found hanging in the employees' bathroom in the house shortly after the discovery of the two bodies on 25th March.

There was also evidence that when the appellants went to the house of the young woman called Camille Benjamin in Bull Bay on the morning of 25th March, Williams' clothes had blood on them and Camille washed the clothes at Williams' request. Camille Benjamin lived with a man named "Omar Cobourne" and Williams told him that he had had a fight with a conductor and the conductor had cut him and he had cut him back, and Cobourne saw that Williams had a cloth wrapped round his finger.

At the trial the admissibility of the statements made by the appellants was challenged and there were two voir dires. Each appellant gave evidence on the voir dire and stated that he had been beaten by the police and forced to sign a statement which he had not made but which had been prepared by the police. Williams said that he had been beaten with guns and kicked in the stomach. Banks said that he had been beaten with a hose and that the police officer had stood on his back. Their evidence was rejected by the learned trial judge who ruled that the statements were admissible.

In the main trial neither of the appellants went into the witness box to give evidence in his own defence, but each made an unsworn statement from the dock.

In his unsworn statement Williams said that he got up to go to work as a bus conductor at 4.30 a.m. on 25th March 1991 and worked all day until 9.00 p.m., and he repeated the allegations he had made on the voir dire that he had been beaten and ill-treated by the police and forced to sign a statement which he had not made.

In his unsworn statement Banks said that he left his home at about 7.30 a.m. on 25th March 1991 and went to Ten Miles, Bull Bay, where he spent the day. He repeated the allegations he had

made in the voir dire that he had been beaten and ill-treated by the police and forced to sign a statement which he had not made. He concluded by saying that he did not see a reason why he should kill his boss as his boss was so kind to him.

Both appellants applied for leave to appeal against their convictions to the Court of Appeal of Jamaica. Two grounds of appeal were advanced on behalf of Williams. The first ground was that the trial judge had erred in admitting in evidence the verbal statement made by Williams to Deputy Superintendent Hewitt before Williams had been cautioned. This statement was made by Williams immediately after the Deputy Superintendent told him that he was investigating the double murder of Keith Ramtallie and Evelyn Ramtallie. This ground of appeal was rejected by the Court of Appeal, which ruled that at the stage when Deputy Superintendent Hewitt spoke to Williams he had not reached the stage where he had obtained the beginnings of a case against Williams.

The second ground of appeal on behalf of Williams was that although the trial judge had given the jury correct directions on the issue of common design, the judge had erred in law because he had directed the jury that if they accepted that Williams had made the written statement attributed to him, then he was guilty of murder under the principle of common design, and thus removed from the jury the issue which it was their function to decide.

The Court of Appeal cited the judgment of Lord Keith of Kinkel in *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55 at page 94 and held that the trial judge had erred because, in breach of the principle stated in that case, he had not left it to the jury to decide whether Williams was guilty in accordance with the concept of common design. However the Court applied the proviso to section 14(1) Judicature (Appellate Jurisdiction) Act and upheld the convictions of Williams on the ground that his written statement showed that he had willingly participated in the events of the morning. The Court stated that the inescapable inference to be drawn from his written statement was that he was present aiding and abetting in the commission of the crimes that morning and that a verdict of not guilty would have been perverse in the circumstances.

The ground of appeal advanced on behalf of Banks was that the trial judge had erred in admitting his written statement in evidence. His counsel submitted that the statement had been taken in an oppressive manner. Counsel further relied on the evidence of a forensic officer and a resident magistrate that they had observed some injuries on Banks after his arrest. Counsel also relied on the fact that the Crown had failed in the voir dire to call

Detective Sergeant Gerald Wallace who had witnessed the statement which the Crown said Banks had made to Detective Assistant Superintendent Howell.

The Court rejected these submissions. As to the first they held that there was no evidence of oppression or of Banks not having slept or eaten. As to the second matter, the Court observed that the prolonged ill-treatment and beatings described by Banks would have resulted in far more extensive injuries than those seen by the forensic officer and the resident magistrate. In relation to Detective Sergeant Wallace the Court held that the fact that the Crown had not called him as a witness on the voir dire did not amount to any irregularity or impropriety on the part of the Crown and that there was no rule which required him to be called.

On the appeal to their Lordships the principal submission advanced on behalf of Williams by Mr. Birnbaum Q.C. was that the learned trial judge had erred in directing the jury that if they accepted the truth of Williams' written statement they should convict him of the two murders.

In his summing up the judge said:-

> "The verdict of guilty in this case Mr. Foreman and members of the jury, can only be returned if you accept the statements made as having been statements presented as having been made by the accused in question, freely, voluntarily, no force, no violence. So if you find that and you reject what the accused is saying in each case about being elsewhere, a proper verdict would be guilty. And in this case two verdicts are open to you: guilty of murder or not guilty of murder."

Later in the summing up after referring to Williams' description in his written statement of how he kept watch at the back gate the judge said:-

> "Any watchman in these circumstances, guilty of murder. Any watchman in these circumstances, is guilty of murder, if you accept it."

A little later, again referring to Williams' written statement, the judge said:-

> "Well, Mr. Foreman and members of the jury, using the principle of common design, as I related it to you earlier, if you accept this, Williams is guilty of murder."

In so directing the jury the judge was, in the opinion of their Lordships, in breach of the principle stated by the majority of

the House of Lords in *Stonehouse* that the judge should not direct the jury to convict. Lord Salmon stated at page 80A-B:-

> "If the judge is satisfied that, on the evidence, the jury would not be justified in acquitting the accused and indeed that it would be perverse of them to do so, he has no power to pre-empt the jury's verdict by directing them to convict. The jury alone have the right to decide that the accused is guilty."

Lord Keith of Kinkel stated at page 94C-E:-

> "It is the function of the presiding judge at a trial to direct the jury upon the relevant rules of law. This includes the duty, if the judge takes the view that the evidence led, if accepted, cannot in law amount to proof of the crime charged, of directing the jury that they must acquit. It is the function of the jury, on the other hand, not only to find the facts and to draw inferences from the facts, but in modern practice also to apply the law, as they are directed upon it, to the facts as they find them to be. I regard this division of function as being of fundamental importance, and I should regret very much any tendency on the part of presiding judges to direct juries that, if they find certain facts to have been established, they must necessarily convict."

As their Lordships have stated, the Court of Appeal recognised that the trial judge had erred in directing the jury that if they accepted Williams' statement as true the proper verdict would be guilty of murder, but the Court of Appeal applied the proviso and upheld the convictions. The Court of Appeal stated:-

> "The applicant's statement on any view, once it was accepted as true, showed that he had willingly participated in the events of that morning. He knew quite well that two murders had been committed by the colleague who had said he was intending to collect his pay, that he stood guard to prevent his colleague being surprised, that he assisted in removing and shared in the proceeds of the morning's enterprise. At no time did he disassociate himself from those events but faithfully kept watch. He could have run off after his discovery of the first murder. He could have made an alarm at any time. He could have reported the crime to the police. He did none of these things. We would think that the inescapable inference to be drawn from his statement was that he was present aiding and abetting in the commission of the crimes that morning. Any other inference would have been unreasonable. A verdict of not guilty would have been perverse in the circumstances."

Mr. Birnbaum criticised this reasoning of the Court of Appeal. He submitted that the statements that Williams "had willingly participated in the events of that morning", and that "at no time did he disassociate himself from those events" begged the question of what were the events in which Williams participated. He contended that the sharing in the proceeds of the morning's enterprise and the failure to run away and to report the crimes to the police were as consistent with complicity in robbery as with complicity in murder. Mr. Birnbaum further submitted that in relation to the application of the proviso, the existence of a powerful case pointing to guilt was not the test but that the test was whether the jury if properly directed would inevitably have convicted.

Their Lordships do not accept these submissions and are of opinion that the Court of Appeal was fully entitled to apply the proviso in this case and that, in stating that a verdict of not guilty would have been perverse in the circumstances, the Court made it clear that it considered that a jury, properly directed, would inevitably have convicted. Moreover as Lord Griffiths stated in delivering the judgment of the Board in *Gayle v. The Queen* (unreported), judgment delivered 12th June 1996:-

> "... it is not the function of the Judicial Committee to act as a second Court of Criminal Appeal. Matters such as the weight properly to be given to evidence, and inferences that may or may not legitimately be drawn from evidence and whether a presumptive or final burden of proof has been discharged, are to be determined by the Court of Appeal in the local jurisdiction, and save in exceptional circumstances the Judicial Committee will not enter upon a rehearing of such issues (see *Muhammad Nawaz v. King-Emperor* (1941) L.R. 68 1.A. page 126, *Badry v. Director of Public Prosecutions* [1983] 2 A.C. 297 at pages 302-303 and *Buxoo v. The Queen* [1988] 1 W.L.R. 820 at page 822)."

Mr. Birnbaum advanced a further argument to their Lordships in reliance on the principle in *Stonehouse* which had not been advanced to the Court of Appeal and which that Court had therefore not considered. The submission was that even if the jury, after a proper direction, would inevitably have convicted Williams of one murder, it was still a matter for the jury to decide whether they would also convict him of the other murder, but the judge had not left this option to the jury and had directed them that the two counts of murder stood or fell together and that if they accepted Williams' statement the proper verdict would be guilty of murder i.e. guilty of both murders. By reason of the double murder rule in Jamaica it is, of course, a matter of great importance whether an accused is convicted of one murder or of two murders.

Their Lordships consider that as a matter of strict practice pursuant to the *Stonehouse* principle the trial judge should have directed the jury to consider the two counts of murder against Williams separately, but their Lordships are of opinion that the judge's failure to give this direction was, in the circumstances of the case, a highly technical misdirection which caused no injustice whatever and that any reasonable jury which convicted Williams of one murder must inevitably have convicted of the other.

Accordingly their Lordships will humbly advise Her Majesty that the appeal of Williams against conviction should be dismissed.

The submissions advanced by Mr. Lawson Q.C. on behalf of the appellant, Banks, to their Lordships were as follows. He submitted that the trial judge should not have concluded, and the Court of Appeal should not have upheld his conclusion, that Banks' written statement was freely and voluntarily made, having regard to the existence of some evidence that Banks had not eaten or slept during the night preceding the making of the statement, and having regard also to the evidence of the forensic officer and the resident magistrate that each of them had noticed some injuries on Banks subsequent to the morning of 26th March 1991.

Mr. Lawson also submitted that the learned trial judge should have been slow to accept the evidence of the police that Banks volunteered "out-of-the blue" to tell them his side of the story as soon as Inspector Asphall told him that he was a prime suspect. Mr. Lawson further contended that it was strange that Assistant Superintendent Howell was unable to procure the attendance of a justice of the peace to witness the taking of Banks' statement as had been done on the taking of Williams' statement. Mr. Lawson further pointed to the fact that on the voir dire the Crown had only called Assistant Superintendent Howell and had not called Inspector Asphall or Detective Sergeant Wallace who had witnessed the taking of the written statement.

Mr. Lawson emphasised the point that, according to Assistant Superintendent Howell, Banks said in the statement:-

> "Me take way Omar knife and mi gi the boss one stab a him belly and mi rip it with the knife",

whereas the evidence of the pathologist who examined the body of Mr. Ramtallie was that the principal injury suffered by him was a wound to the throat and there were less serious wounds on the face and on a hand and arm and two wounds on the left side of the chest. Therefore Mr. Lawson submitted that the account in the statement of the wound inflicted by Banks with the knife in the belly was inconsistent with the findings of the pathologist. He contended that the trial judge had not taken this discrepancy into

account in his ruling on the voir dire in relation to the issue of voluntariness, and had also failed to direct the jury to have regard to this discrepancy but had impliedly suggested to them that the evidence of the pathologist was consistent with the account given by Banks in his statement. Mr. Lawson also submitted that the trial judge failed to take account of the fact that Banks described his two accomplices as "Lloyd" and "Omar", and that there was no evidence that the co-accused, Williams, was called "Lloyd", it being suggested that the "Omar" referred to in the statement was Omar Cobourne, who lived at Bull Bay with Camille Benjamin, who had washed Williams' clothes on the morning of 25th March.

However the assessment of the evidence given on the voir dire and, in particular, the assessment of the credibility of the police witnesses and of Banks was, as the Court of Appeal observed, a matter for the trial judge who had the great advantage of seeing them give their evidence in the witness box. In addition their Lordships are of the opinion that the minor injuries on Banks seen by the forensic officer and by the resident magistrate were quite inconsistent with the serious beatings which he alleged and were much less extensive than he would have suffered if he had been ill-treated by the police as he claimed.

In relation to the alleged discrepancy between the findings of the pathologist and the description in Banks' statement that he stabbed and ripped Mr. Ramtallie in the belly, it is relevant to observe that the pathologist found wounds to the chest. It is quite apparent that Banks spoke in a way which was far from being clear and precise and their Lordships consider that Banks might well describe a stab wound to the chest as a stab in the belly. It is clear that the principal wound sustained by Mr. Ramtallie was a wound to the throat and in the statement, just before describing how he stabbed Mr. Ramtallie in the belly, Banks said: "Him neck did cut a ready". Furthermore, as already observed, it is not the function of the Board to sit as a second Court of Criminal Appeal.

Their Lordships will therefore humbly advise Her Majesty that the appeal of Banks against conviction should be dismissed.

The appeal against conviction of Zephaniah Hamilton.

On the evening of 13th October 1988 three men were sitting at a table outside a shop playing dominoes in the High Mountain district of Saint Catherine, Jamaica. They were Patrick Forbes, the owner of the shop, Jacksford McDermoth and Lynval Henry. A fourth man, Robert Bell, was watching the game. It was dark, the table was lit by a bottle lamp, and the shop was lit by a lamp.

At least two men attacked the group around the table with machetes. Jacksford McDermoth received a wound on the head as he sat at the table, but he managed to escape to a nearby house. When McDermoth was struck Patrick Forbes ran away round the corner of his shop, receiving a machete blow to his hand as he rounded the corner, and he hid in the undergrowth of a yam bush. When the police arrived at the scene later in the evening they discovered the body of Lynval Henry lying on an embankment in a clump of bushes about three or four chains away from Patrick Forbes' shop. He had been killed by several blows from a machete and his left hand had been severed from his arm. The police also found the body of Robert Bell lying on the ground a short distance away from Patrick Forbes' shop with blood stains leading from the shop to the location of the body. Robert Bell had also been killed by a number of blows from a machete.

On 14th October 1988 on information supplied by Patrick Forbes the police obtained a warrant for the arrest of the appellant, Hamilton, and he was arrested pursuant to the warrant on 28th March 1989. The trial of the appellant for the murders of Lynval Henry and Robert Bell took place before Rowe C.J. (Ag.) and a jury in December 1991. The evidence presented by the Crown at the trial was evidence of identification given by Jacksford McDermoth and Patrick Forbes. Jacksford McDermoth said that as he got the chop on the head and went down on the ground he looked and saw the appellant, Hamilton, standing over him with a cutlass in his hand; Hamilton cursed and said "This one die". McDermoth said that he saw Hamilton's face and the majority of his body. Hamilton then used his hand to turn over the table, the other fellows started to run and Hamilton turned the machete to Bell.

McDermoth gave somewhat confused evidence that he knew the appellant, Hamilton, prior to the attack because they had attended the same basic school together in Princessfield when he (McDermoth) was aged about seven or eight. He later said that he had not seen Hamilton since the basic school days, though he then said that he had last seen him five or six years ago, and that he (McDermoth) was now aged twenty three.

Patrick Forbes said that while he was hiding in the undergrowth after the attack on McDermoth he heard the sound of cutlass blows being struck and heard Lynval Henry crying out "murder, help". After hiding in the undergrowth for about fifteen minutes he came out and saw at a distance of about eleven yards the appellant and another man inside his shop, which was lit by the lamp inside it. He watched the appellant and the other man whilst they were inside the shop for about seven to ten minutes,

and he saw the face of the appellant. The appellant and the other man were taking down bottles from the shelves. After watching the appellant and the other man inside the shop for the period he described, Forbes threw a stone at the shop which hit the shop, and after this the appellant and the other man ran out of the shop. The appellant was carrying a cheese pan with silver from the shop and a bottle of drink and his cutlass. The appellant and the other man ran away up the road.

Forbes said that he had known the appellant before 13th October 1988. He had first seen him about three months before the attack bathing in a canal by the flatland at Church Road, and he saw him after that about three times before 13th October 1988, and he knew him as "Jack". It was his evidence that when he observed the two men in his shop after the attack he recognised the man who was taking down bottles off the shelves as the appellant.

The appellant did not go into the witness box to give evidence in his own defence and no witnesses were called on his behalf. The appellant made an unsworn statement from the dock which was as follows:-

> "My Lord, on the 12th day of October 1988, I was passing through High Mountain district and rush by a group of man, beaten badly and chop up, my Lord. I went to the doctor at Linstead. Rush by a group of man. I get several chop to mi body, my Lord and beating. I went to the doctor at Linstead. Doctor Massop, go get stitch and dress on mi left hand and mi right foot and pon mi left hip - wearing bandages. I den home 2-3 week. I don't know none of these men, your honour. I never hear of any of them. I don't know any of these men. I don't kill anyone.
>
> On the night I was down my district, my Lord, Princessfield. Hear shouting when some people come through. I hear them talking say killing 'Guaan' round a High Mountain, while playing domino, my Lord.
>
> I have nothing more to say, my Lord. I don't none of these men. Is not me kill them my Lord."

In his summing up the learned trial judge gave the jury a very careful and fair direction as to the need for caution in convicting on evidence of identification. He told them that there was nothing in the rest of the evidence to support or corroborate the identification evidence and warned them that there was always the danger that an honest witness could be mistaken as to the identity of another person, and that they must approach a case

like the one before them with the utmost caution. The judge directed the jury that they should be slow to act on the evidence of Jacksford McDermoth and that the prosecution case really depended on the evidence of Patrick Forbes and if they had any doubt about his evidence they should find the appellant not guilty.

At the end of the summing up there was a passage in which the trial judge referred to the appellant's statement from the dock:-

> "The Crown has said: You know Mr. Hamilton has told you a significant thing. He told you the very night before he was passing through High Mount and men beat him. He says: We didn't know that, he never did say any of these men. Mr. Cousins asking questions never ever suggested that these people beat his client or they know of anybody who beat his client in High Mount. We talked about bandaged but he never said one word about the accused being beaten in High Mount. So the prosecution says to you the jury, that is the beginning of the case. Some people seemed to have troubled Mr. Hamilton one night and Mr. Hamilton went back with a gang the following night and wreak havoc in the area, so she says, revenge, revenge. She says out of his own mouth comes the motive and she says this helps you to show that our case is proved: that is a matter for you. I tell you that Mr. Hamilton does not have to say he was at home. He does not have to prove he was at home. He does not have to prove he was bandaged up and therefore either couldn't walk or couldn't attack in the way the prosecution said he did."

On the application for leave to appeal to the Court of Appeal of Jamaica three grounds of appeal were advanced. The first ground was that there was no evidence that the two men who attacked the group playing dominoes were the same men as those who killed Lynval Henry and Robert Bell as their bodies were found a little distance away from the shop. This ground was rejected, the Court of Appeal observing that there was clear evidence that both Henry and Bell were attacked at the shop and were chased as they tried to make their escape.

The second ground was that the quality of Patrick Forbes' evidence going to identity was weakened because he said in cross-examination that he thought it was moonlight. This ground was rejected and the Court of Appeal pointed out that Forbes had not purported to identify anyone by moonlight but that he had identified the appellant when he observed him for seven to ten minutes in his shop which was lit by a lamp.

The Court of Appeal rejected a third ground which was that the trial judge had misdirected the jury in relation to Patrick

Forbes' evidence as to when he heard Lynval Henry crying out that he had been murdered.

The written notice of appeal specified a ground which does not appear to have been advanced in oral argument by counsel before the Court of Appeal, and this ground was as follows:-

> "That in her address to the jury Crown counsel wrongly observed that because the accused claimed he had been beaten up the day before by some men he had gone on a 'mission of vengeance' although he never identified the men killed as being the ones who had beaten him up before."

Before their Lordships Mr. Birnbaum criticised the passage at the end of the summing up in which the learned trial judge referred to the revenge theory suggested by Crown counsel, and Mr. Birnbaum submitted that this passage deprived the appellant of a fair trial. Mr. Birnbaum contended that there was nothing in the evidence to support this theory and that accordingly the judge should have made this clear to the jury and should have directed them to disregard the revenge theory. But instead the judge left the theory to the jury, and this constituted a misdirection, particularly because it negated the direction the judge had earlier given that there was nothing in the evidence to support the evidence of identification.

Their Lordships are of opinion that there was no evidence to support the revenge theory and accordingly, if the trial judge was going to refer to the theory in his summing up, he should have done so for the purpose of directing the jury to disregard it. But, viewing the summing up as a whole, they consider that the judge's reference to the theory and his failure to tell the jury to disregard it, fell far short of the type of comment referred to in *Mears v. The Queen* [1993] 1 W.L.R. 818 at pages 822-823 which makes a summing up unbalanced and deprives the accused of the substance of a fair trial.

The reference to the revenge theory was made after the judge had given a very clear and fair warning of the dangers inherent in identification evidence. Moreover the judge did not himself adopt or advance the revenge theory. He referred to it as a theory advanced by Crown counsel and he told the jury, referring to the theory, "that is a matter for you" (although it is not entirely clear from the transcript whether the judge used those words as his own, or whether he was repeating words used by Crown counsel). Furthermore the judge had previously told the jury that the comments of counsel were not binding on them and that, if counsel's comments did not fit in with the jury's own views, the comments should be rejected. And the judge ended the passage which Mr. Birnbaum criticised by saying:-

> "I tell you that Mr. Hamilton does not have to say he was at home. He does not have to prove he was at home. He does not have to prove he was bandaged up and therefore either couldn't walk or couldn't attack in the way the prosecution said he did."

Therefore their Lordships are of opinion that the reference to the revenge theory did not deprive the appellant of a fair trial or render the convictions unsafe.

Mr. Birnbaum also submitted that before leaving the revenge theory to the jury the trial judge should have invited the submissions of counsel on whether he should do so. However the rule that the judge should not introduce a new point into a summing up primarily applies where the point has not been actively canvassed in the course of the trial. In *Reg. v. Feeny* (1991) 94 Cr.App.R. 1 at page 6 Judge J. stated:-

> "In the present case it was the Judge who raised the question of recklessness. The Crown's case throughout was that the appellant had been a willing party to a joint enterprise, intentionally and deliberately to deceive the Building Society. The defence conducted the defence throughout so as to deal with that case being presented against the appellant. The issue of recklessness was not raised either by counsel for the Crown or by counsel for the appellant in the course of their closing addresses to the jury. Two issues therefore arise. The first is whether the Judge should have left the question of recklessness to the jury at all. The second is whether the directions he gave the jury were adequate and correct. It is unfortunate that the judge took the course he did. Although the judge is responsible for deciding how the case should be left to the jury, this Court has repeatedly emphasised that if he concludes that it is appropriate to leave it on a basis which has not previously been canvassed, he should afford counsel the opportunity to address him about it and deal with it before the jury. That principle is well established."

But in the instant case the issue had been raised by Crown counsel in her closing address, and counsel for the defence was therefore aware of it and had a full opportunity to reply to the point in his closing address to the jury. Accordingly their Lordships consider that there was no unfairness in the fact that the judge referred to the matter in his summing up, without informing counsel that he was proposing to do so.

In his summing up the judge directed the jury on the basis that, if they were satisfied as to the identification of the appellant by Patrick Forbes, they should find the appellant guilty of both

murders. He did not leave it open to the jury to convict the appellant of one murder and to acquit him of the other. The appellant's written case to the Judicial Committee advanced the argument that, under the principle stated in the case of *Stonehouse*, this was a misdirection as it withdrew from the jury an issue which it was their function to decide. In his submissions before their Lordships Mr. Birnbaum referred to this point, but did not advance it as an argument of weight.

As they have stated in considering the appeal of Williams, their Lordships are of opinion that as a matter of strict practice the trial judge should have directed the jury to consider the two counts of murder against Hamilton separately, but it is clear that a jury would inevitably have concluded that the men who were involved in the attack on the group playing dominoes killed both Henry and Bell in the joint attack, so that the judge's failure to direct the jury to consider the two counts of murder separately was a highly technical misdirection which caused no injustice to the appellant.

Accordingly their Lordships will humbly advise Her Majesty that the appeal of Hamilton against conviction should be dismissed.

The review procedure under section 7 of the 1992 Act.

Before their Lordships turn to the second part of the appeals to consider the submissions of the appellants in respect of the review procedure it is necessary to refer to the legislative background. This has already been set out in the judgment of this Board delivered by Lord Woolf in *Huntley v. Attorney General for Jamaica* [1995] 2 A.C. 1 at pages 7-8 and their Lordships gratefully adopt the statement in that case:-

> "In Jamaica, prior to the commencement of the Offences against the Person (Amendment) Act 1992 on 13 October 1992, section 2 of the Offences against the Person Act 1864 required anyone convicted of murder to be sentenced to 'suffer death as a felon.' The Act of 1992 repealed section 2 of the Act of 1864 and substituted for that section a new section 2 which established two separate categories of murder; capital murder and non-capital murder. The new section 2(1) sets out the circumstances which constitute capital murder. They include a murder committed by a person in the course or furtherance of a robbery. This is, however, subject to section 2(2) of the new section which provides that if:
>
> > 'two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by

> his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it.'

Section 3 of the Act of 1992 made amendments to section 3 of the Act of 1864. It provided that 'Every person who is convicted of capital murder shall be sentenced to death' and that:

> '(b) ... (1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has - (a) whether before or after the date of commencement of the Offences against the Person (Amendment) Act 1992, been convicted in Jamaica of another murder done on a different occasion; or (b) been convicted of another murder done on the same occasion.'

Section 3B was added to section 3 of the Act of 1864 by section 4 of the Act of 1992. Section 3B(5) requires a person to be given at least seven days' notice before his trial of any conviction upon which it is proposed to rely and for that conviction to be admitted or 'found to be proven by the trial judge.' Section 4 of the Act of 1992 also amended the Act of 1864 by introducing a section 3A into the Act of 1864. Section 3A(1) made the sentence for non-capital murder life imprisonment.

These provisions of the Act of 1992 do not apply to persons convicted of murder prior to the commencement of the Act of 1992. However, those persons who, at the date of the commencement of the Act of 1992, were already under a sentence of death for murder are dealt with by section 7 of the Act of 1992. The object of section 7 is to ensure that the position of those awaiting execution before the coming into force of the Act of 1992 is no worse than those convicted of murder after the coming into force of that Act. The section therefore provides that those under sentence of death when the Act of 1992 comes into force are to have the murder of which they have been convicted classified as capital or non-capital murder by applying the same method of classification as would have been applicable if the Act of 1992 had been in force when the murderer was convicted. They were also to have their appropriate sentence redetermined in accordance with the provisions of the Act of 1864, as amended by the Act of 1992."

Under the 1992 Act there are therefore two types of case where the review under section 7 can result in a determination that the relevant murder is one where the death penalty is to be carried out. One class is where a single murder (such as a murder committed in the course or furtherance of a robbery where the defendant himself used violence against the victim) constitutes a capital murder under section 2(1) of the 1864 Act as amended by the 1992 Act. The other class is where, under section 3(1A) of the Act of 1864 as amended by the 1992 Act, the convicted person had committed two non-capital murders done on different occasions or on the same occasion.

Determinations have been made under section 7 in respect of each of the four appellants which may be summarised as follows.

Determinations under section 7 in respect of Kervin Williams and Melbourne Banks

In refusing on 20th June 1994 the applications of Williams and Banks for leave to appeal against their convictions the Court of Appeal purported to determine that the two murders of which Williams had been convicted were to be classified as non-capital murders because in the course of the robbery he himself had not used violence against the two victims, but the Court of Appeal held that the sentence of death upon him was warranted because he had been convicted of two murders done on the same occasion.

The Court of Appeal also purported to determine in respect of Banks, on a concession made by his counsel, that he was guilty of two capital murders and that therefore the sentence of death upon him was warranted. Their Lordships assume that this purported determination was made on the ground that Banks had himself used violence against the victims in the course of the robbery. The Court of Appeal also purported to determine that the sentence of death upon Banks was warranted because he had been convicted of two murders done on the same occasion. However the decision of this Board in *Simpson v. The Queen* [1997] A.C. 1 makes it clear that the Court of Appeal did not have jurisdiction to carry out the classification procedure which it purported to perform in respect of Williams and Banks whose convictions had taken place before the coming into force of the 1992 Act.

However, notwithstanding the purported classification by the Court of Appeal in refusing the applications for leave to appeal, the sentence of death on Banks was reviewed pursuant to section 7 by a single judge of the Court of Appeal and on 22nd April 1996 Banks was notified that the single judge had classified the murders of which he had been convicted as capital murders and

that the sentence of death was warranted. On 18th November 1996 Banks was notified that three judges of the Court of Appeal had confirmed the determination of the single judge that the murders for which he had been convicted were capital murders and that the sentence of death was warranted.

The sentence of death on Williams was reviewed pursuant to section 7 by a single judge of the Court of Appeal and on 25th June 1996 Williams was notified that the single judge had classified the murders of which he had been convicted as non-capital murders but the sentence of death had been confirmed because the convictions related to two murders done on the same occasion. Williams requested that the determination by the single judge be reviewed by three judges of the Court of Appeal but by a letter from the Registrar of the Court of Appeal this request was refused on the ground that where the single judge had classified the murders as non-capital murders the convicted person had no right to a further review by the three judges in respect of the confirmation of the sentence of death by the single judge. In the opinion of their Lordships this decision to refuse a further review by the three judges was erroneous for the reasons stated in a later part of this judgment.

Determination under section 7 in respect of Zephaniah Hamilton

It appears that the sentence of death on Hamilton was reviewed pursuant to section 7 by a single judge of the Court of Appeal but their Lordships were not informed of the date of that review or of the date on which notification of the determination by the single judge was given to Hamilton, and their Lordships assume that the single judge confirmed the sentence of death on the ground that the two non-capital murders of which Hamilton had been convicted were done on the same occasion. On 22nd February 1995 three judges of the Court of Appeal pursuant to section 7 confirmed the sentence of death on the ground that the two non-capital murders were done on the same occasion.

Determination under section 7 in respect of Junior Leslie

On the trial of Junior Leslie in April 1990, at which he and a co-accused were convicted of the murders of Marceline Morris and her son Dalton Brown, it was proved that Junior Leslie and the co-accused entered the house of the two victims armed with hand guns and the co-accused shot and killed both victims. The motive for the murders was not disclosed in the evidence. It appears that the sentence of death on Leslie was reviewed pursuant to section 7 by a single judge of the Court of Appeal but their Lordships were not informed of the date of that review or of the date on which notification of the determination by the single judge was given to Leslie, and their Lordships assume that the single judge

confirmed the sentence of death on the ground that the two non-capital murders of which Leslie had been convicted were done on the same occasion. On 7th April 1995 three judges of the Court of Appeal pursuant to section 7 confirmed the sentence of death on the ground that the two non-capital murders were done on the same occasion.

The submissions of the appellants to their Lordships related to the double-murder rule contained in section 3(1A). Section 3B(5) of the 1864 Act provides:-

> "A person referred to in subsection (1A) of section 3 shall not by virtue of that subsection be sentenced to death by reason of a previous conviction for murder unless -
>
> (a) at least seven days before the trial notice is given to him that it is intended to prove the previous conviction; and
>
> (b) before he is sentenced, his previous conviction for murder is admitted by him or is found to be proven by the trial Judge."

In *Simpson v. The Queen* this Board held that the requirement under section 3B(5)(a) that notice be given of a previous conviction applied only in respect of a conviction at a previous trial and that where two non-capital murders were the subject of a single trial no such notice was required before the person convicted of the two non-capital murders could be sentenced to death. Therefore the double murder rule applied and can lead to the death penalty not only where the two convictions for murder took place in successive trials and a notice under section 3B(5)(a) had been given before the second trial, but also where the two convictions took place at the same trial so that no notice had been given. In delivering the judgment of the Board Lord Goff of Chieveley stated at pages 10-11 that the primary submission on behalf of the appellant Simpson was that:-

> "... on the true construction of the Act, no person is in peril of sentence of death for a non-capital murder unless, prior to the commencement of the trial, he is given notice in accordance with section 3B(5) of an antecedent conviction for murder. This submission was similar to that unsuccessfully advanced on behalf of the appellant before the Court of Appeal. In the alternative, he submitted, that the statute at least requires that the defendant should be given notice of his liability to be sentenced to death if convicted of more than one offence of non-capital murder.

Their Lordships are unable to accept these submissions. They approach the matter as follows. Turning to section 3B(5), they are satisfied that the function of the notice referred to in the subsection is that the defendant should have the opportunity to contest the validity of the previous conviction referred to in the notice. This strongly indicates that the section is concerned with those cases in which at the trial reliance will be placed by the prosecution upon a conviction of the defendant for murder at a previous trial; in other words, the expression 'a previous conviction for murder' should be construed as referring to a conviction for murder at a previous trial. This reading is supported by internal evidence from the section, viz. the reference in paragraph (a) to a notice being given seven days before the trial of intention to prove the previous conviction, which can only refer to a conviction at a previous trial; and the requirement in paragraph (b) that the previous conviction should have been admitted by the defendant or found to be proved by the trial judge, which again is consistent only with the previous conviction having taken place at a previous trial.

This construction, moreover, enables section 3B(5) to lie well with section 3(1A). If the requirement of notice is understood to apply only in respect of a conviction of murder at a previous trial, it will in those circumstances be capable of applying, where appropriate, to either section 3(1A)(a) or (b). Of course, in most cases where the other murder was committed on a different occasion, the conviction will have taken place at a previous trial, and in such circumstances a notice will be required under section 3B(5); and in most, indeed almost all, cases where the other murder was committed on the same occasion, the conviction will have taken place at the same trial, immediately before the second conviction, in which event no such notice will have been necessary. This is no doubt what the Court of Appeal of Jamaica had in mind. But it is conceivable that two murders committed by a person on different occasions may be the subject of a single trial, and that two murders committed by a person on the same occasion may be the subject of different trials, in which event notice will have been required in the second case but not in the first.

Their Lordships wish to add that, in a case where two non-capital murders are the subject of a single trial, no formal notice is required by the Act, even though the defendant is by virtue of section 3(1A) liable to be sentenced to death if convicted of both. The risk will be obvious, and no doubt will be drawn to the attention of the defendant by his counsel."

On these appeals the appellants wish to submit that the decision of this Board in *Simpson v. The Queen* was erroneous and that a sentence of death cannot be imposed in respect of murders committed after the commencement of the 1992 Act where an accused has been convicted of two non-capital murders in the same trial where no notice has been given under section 3B(5)(a). If this submission were correct the appellants would further submit that the three judges cannot determine pursuant to section 7 that a sentence of death was warranted in respect of convictions for two non-capital murders in the same trial. If these two submissions were valid the appellants Williams, Hamilton and Leslie would not be liable to the death penalty because each of them had been convicted of two non-capital murders in the same trial. The appellant Banks would also not be liable to the death penalty if these two submissions were correct, and if he could also succeed in a further submission to the Board that the three judges performing the classification process under section 7 had erred in determining that the murders of Keith Ramtallie and Evelyn Ramtallie had been committed in the course or furtherance of a robbery and that therefore the murders of which he had been convicted were capital murders. In addition the appellants wished to advance further submissions relating to the constitutional validity of section 3(1A) and the liability of the appellants to execution. However before those submissions can be advanced the anterior question arises whether their Lordships have jurisdiction to hear such submissions and their Lordships now turn to consider this question.

Jurisdiction.

Section 7 of the 1992 Act provides:-

"7.-(1) Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date may be pending in respect of those persons or any right of those persons to appeal.

(2) For the purposes of subsection (1), the case of every person referred to in that subsection shall be reviewed by a Judge of the Court of Appeal with a view to determining -

(a) whether the murder to which the sentence relates is classifiable as a capital or non-capital murder in

accordance with the principles set out in the principal Act as amended by this Act;

(b) whether sentence of death would in any event be warranted having regard to the provisions of section 3(1A) of the principal Act as amended by this Act (repeated and multiple murders); and

(c) whether, and if so to what extent, a specified period should elapse before the grant of parole in a case where murder is classifiable as non-capital murder,

and shall determine the appropriate sentence in accordance with the principles set out in the principal Act as amended by this Act.

(3) Where, pursuant to subsection (2), a Judge of the Court of Appeal classifies a murder as capital murder, he shall by notice in writing to the person convicted of the murder, inform that person of the classification and of the rights conferred by subsection (4).

(4) A person who is notified pursuant to subsection (3) shall -

(a) have the right to have the classification reviewed by three Judges of the Court of Appeal designated by the President of that Court and to appear or be represented by counsel; and

(b) within twenty-one days of the date of receipt of the notice indicate in writing his desire for such review,

and any written representations in support of a change in that classification shall be made within the period of twenty-one days aforesaid.

(5) The Judges of the Court of Appeal referred to in subsection (4) shall review the classification referred to in that subsection and shall make the appropriate determination specified in subsection (2) and their decision shall be final."

A preliminary issue in relation to the interpretation of section 7 was raised in the appellants' cases. The point arises because sub-paragraph (a) of section 7(2) refers to the determination by a judge of the Court of Appeal whether the murder is "classifiable" as a capital or non-capital murder, whereas sub-paragraph (b) of the subsection refers to a determination by the single judge "whether sentence of death would in any event be warranted" having regard to the double murder rule set out in section 3(1A). But subsections (3), (4) and (5) of section 7 state that the three judges

of the Court of Appeal shall review "the classification" of the murder as a capital murder by the single judge. On a strict interpretation of the section this might suggest that the three judges could not review a determination by the single judge that a sentence of death would be warranted by reason of the provisions of section 3(1A) relating to double murders when read together with section 3B(5).

However this construction would give rise to an illogical result in that the three judges could review a determination by the single judge that a murder is a capital murder but could not review a determination by the single judge that a sentence of death would be warranted under the double murder provisions. Moreover subsection (5) directs the three judges to make the appropriate "determination" specified in subsection (2), which determination relates to decisions of the single judge under both sub-paragraphs (a) and (b). Their Lordships did not understand the Crown to argue against the construction which permits the three judges to review a determination by the single judge that a sentence of death would be warranted under the provisions of section 3(1A) and section 3B(5) relating to double murders, and their Lordships consider it right to give this construction to section 7. Their Lordships observe that this construction appears to have been applied in the review by three judges in the cases of Zephaniah Hamilton and Junior Leslie.

It is also relevant to observe that the issue of jurisdiction which arises on the instant appeals did not arise in the case of *Simpson v. The Queen* because (unlike the present appellants) the appellant Simpson was convicted after the coming into force of the 1992 Act and he then appealed to the Court of Appeal of Jamaica against his conviction, and his appeal to this Board was from the Court of Appeal of Jamaica. The other appellants Morgan, Williams and Wallace had each been convicted of murder in 1991. After the 1992 Act had come into force they applied for leave to appeal against their convictions to the Court of Appeal of Jamaica, and on their applications for leave to appeal (in the cases of Morgan and Wallace) and on the hearing of the appeal (in the case of Williams) the Court of Appeal of Jamaica purported to make determinations under section 7 of the 1992 Act. This Board held that the Court of Appeal of Jamaica in its appellate capacity had no jurisdiction to perform the classification procedure under section 7, but nevertheless the appeals of Morgan, Williams and Wallace came before this Board as appeals from decisions of the Court of Appeal of Jamaica.

The jurisdiction of this Board to hear appeals from Jamaica now arises under section 110 of the Constitution of Jamaica which provides:-

"(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter. ...

(5) A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a Court of Jamaica."

Having regard to the provisions of section 110(3) and (5) and the provisions of section 7 of the 1992 Act the question as to the jurisdiction of their Lordships which arises may be stated as follows: Is an appeal against a determination under section 7 by three judges of the Court of Appeal an appeal from a decision of the Court of Appeal of Jamaica on appeal from a Court of Jamaica? If the answer to that question is in the affirmative, the further question then arises whether an appeal to the Board is barred by section 7(5) of the 1992 Act which provides that the decision of the three judges of the Court of Appeal "shall be final".

The nature of the decision of the review panel of three judges.

The decision of this Board in *Simpson v. The Queen* was that the three judges designated by the President of the Court of Appeal to carry out the review under section 7 do not perform their task as the Court of Appeal of Jamaica as such. At page 14B-E Lord Goff of Chieveley stated:-

"Now it is plain that, in the two cases under consideration, the Court of Appeal was purporting to act in its capacity as the Court of Appeal of Jamaica in determining whether or not to classify the murders as capital or non-capital. This appears in particular from the orders made by the Court of Appeal in each case. Their Lordships are clearly of the opinion that the Court of Appeal, acting as such, had no jurisdiction to carry out any such classification exercise; and, indeed, Mr. Guthrie for the Crown experienced great difficulty in arguing to the contrary. First of all, it is plain that the statutory power of review is vested not in the Court of Appeal of Jamaica as such, but in judges of the Court of Appeal, the three judges of the Court who perform the second stage of the review procedure being nominated for that specific purpose by the President of the court. Second, it is also plain that there is no other provision, in the amendment Act or elsewhere, from which the Court of Appeal as such derives jurisdiction to perform the classification procedure in these cases. It follows that, in the present cases, the Court of Appeal purported to make orders which they had no jurisdiction to make."

However Mr. Birnbaum Q.C. argued that their Lordships, on further consideration, should not follow this ruling but should hold that the process of review under section 7 was carried out by the Court of Appeal of Jamaica. Mr. Birnbaum's submissions were as follows. As already stated, section 7(1) of the 1992 Act provides:-

> "Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date may be pending in respect of those persons or any right of those persons to appeal."

In *Huntley's* case Lord Woolf stated at page 12:-

> "There can be no doubt that after the Act of 1992 came into force, it would be unlawful to execute those who had previously been guilty of murder until after the classification process had been completed. Furthermore for a murder to be classifiable as a capital murder under the criteria contained in the Act of 1992, in the appellant's case, involved considering facts which were not essential to establish his guilt at his trial."

Section 14 of the Constitution of Jamaica provides:-

> "(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

Section 15 of the Constitution provides:-

> "(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law -
>
> ...
>
> (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; or
> ..."

Therefore Mr. Birnbaum submitted that it would be unlawful to execute a convicted murderer pursuant to the classification procedure carried out under section 7 or to imprison for life a convicted murderer whose offence was classified as non-capital under that procedure unless the three judges of the Court of Appeal acting pursuant to section 7(4) constituted a "court", and

that in passing the 1992 Act the Parliament of Jamaica must have intended that the three judges of the Court of Appeal would constitute a "court".

Mr. Birnbaum pointed to section 103 of the Constitution which establishes the Court of Appeal of Jamaica. Section 103 provides:-

> "(1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.
>
> ...
>
> (3) The President of the Court of Appeal shall be responsible for the arrangement of the work of the Court and shall preside whenever he is sitting in that Court."

Mr. Birnbaum submitted that the Act of 1992 giving the jurisdiction and power to classify murders as capital or non-capital is "any other law" as referred to in section 103(1), and that when the President of the Court of Appeal, pursuant to section 7(4), designates three judges of the Court of Appeal to carry out the classification review, the President is carrying out the responsibility for arranging the work of the Court of Appeal given to him by section 103(3) of the Constitution. Accordingly, he submitted, the three judges designated by the President constituted the Court of Appeal of Jamaica. This argument was not advanced in *Simpson v. The Queen*, but their Lordships think it unnecessary to express any opinion upon it because they consider that this Board has no jurisdiction to hear the appeals in respect of the review procedure under section 7 for other reasons which they now state.

Whether or not the three judges of the Court of Appeal carrying out the classification procedure under section 7(4) constitute the Court of Appeal of Jamaica, this Board does not have jurisdiction under section 110(3) of the Constitution to grant special leave to appeal from a decision of the three judges in respect of a classification of a murder unless that decision is itself given "on appeal from a Court of Jamaica". In the opinion of their Lordships the single judge of the Court of Appeal carrying out a review under section 7(2) cannot be regarded as a "Court of Jamaica" within the meaning of section 110(5). This is because he (unlike the three judges of the Court of Appeal in the second stage of the process) does not hear representations on behalf of the prisoner and does not conduct any form of hearing. In *Huntley's* case Lord Woolf stated at page 13C-E:-

> "The statute makes it clear that the exercise that the judge is to perform is not to conduct a hearing but to determine 'whether the murder to which the sentence relates is classifiable

> as capital or non-capital murder'. The exercise is a limited one. To review 'the case', the judge can do no more than review the record of the trial which has already taken place and determine on that record whether the murder should be 'classifiable as a capital or non-capital murder' in accordance with the criteria introduced by the Act of 1992."

And at page 16H Lord Woolf approved the statement of Wolfe J.A. that "the single judge's role is nothing more than a winnowing exercise".

If the argument be correct that only a "court" can impose a fresh sentence of death under the classification procedure provided in section 7, and the further argument is therefore advanced that the single judge must be "a court", that further argument is answered, in their Lordships' opinion, by the consideration that the review by the first judge is closely linked with the second review by the three judges, so that "a court" will, in practice, ultimately decide whether there should be a fresh death penalty, and Lord Woolf stated in *Huntley's* case at page 15A:-

> "It is clear from the language of section 7 itself that the review by the single judge is closely related to the review by the three judges. In this respect the machinery of section 7 is very much of a class which has to be considered as a whole when deciding what fairness requires."

Accordingly their Lordships consider that they do not have jurisdiction to hear an appeal against a classification by the three judges of the Court of Appeal, because the decision of those three judges under section 7(5) is not given "on appeal from a Court of Jamaica".

The final question which arises for consideration is whether the jurisdiction of this Board is excluded by the words of section 7(5) that the decision of the three judges "shall be final", whether or not section 110(3) and (5) of the Constitution would otherwise permit an appeal to the Board against the classification of the three judges to be brought with special leave. Mr. Birnbaum submitted that these words should not be construed as excluding the right of appeal to this Board. He relied on the well established principle that access to a court of justice can only be removed by clear words: *Raymond v. Honey* [1983] 1 A.C. 1, *Leech v. Deputy Governor of Parkhurst Prison* [1988] A.C. 533. He submitted that as the decision of the three judges related directly to the imposition of the death penalty and as the other subsections of section 7 gave rise to difficult questions of

construction, it could not be said that the wording of subsection (5) was sufficiently clear to exclude the jurisdiction of the Board. He also pointed to the concluding words of the judgment in *Huntley's* case as indicating that the Board recognised that a prisoner would have a right of appeal from the decision of the three judges, the judgment stating at page 17F:-

> "Because this was a test case, their Lordships make no adverse comment about the fact that the appellate procedure was put in motion before the classification had been considered by the three judges. However in a future case, it may be considered more appropriate to know the result of the review by the three judges before the position is examined by the courts."

However, notwithstanding that the decision under section 7 is in respect of the imposition of the death penalty, their Lordships are unable to come to any conclusion other than that the wording of section 7(5) was clearly intended by the Parliament of Jamaica to exclude the right of appeal to this Board. Their Lordships recognise that words used in one statute may well not have the same meaning when used in another statute in a very different context, but their Lordships are fortified in the view they take by the decision of the Court of Appeal of New Zealand in *Nunns v. Licensing Control Commission* [1968] N.Z.L.R. 57. In that case section 144(5) of the Summary Proceedings Act 1957 provided:-

> "The decision of the Court of Appeal on any appeal under this section shall be final."

A party applied to the Court of Appeal for leave to appeal from its decision to this Board, but the Court of Appeal refused leave. Turner J. stated at pages 62-63:-

> "I have no doubt that the word 'final' where used in this section means 'unappealable'- see *In re Ell, Ex parte Austin and Hoskins* (1886) 4 N.Z.L.R. (C.A.) 114, 126; *Re Bruce's Patent Oatmeal and Milling Co. Ltd.* (1890) 8 N.Z.L.R. 598, 608; *Ewing v. Scandinavian Water-Race Co.* (1904) 24 N.Z.L.R. 271, 291; *Kydd v. Liverpool Watch Committee* [1908] A.C. 327; *Reg. v. Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574, 583, 587. The words of subs (5) amount therefore to a declaration by the Legislature that the decision of this Court in this case may not be the subject of appeal; and for this reason the present application must be refused."

And McCarthy J. stated at page 63:-

> "I agree that this application must be dismissed. The word 'final' in s. 144(5) plainly means 'unappealable', and the cases

> quoted by Turner J. seem to me to be a complete answer to Mr. Patterson's submissions and to establish that this Court cannot give leave."

Accordingly their Lordships hold that, in addition to section 110(3) and (5) of the Constitution, section 7(5) of the 1992 Act also excludes any appeal by special leave to this Board from the classification by the three judges under that subsection.

For the reasons given their Lordships will humbly advise Her Majesty that these four appeals should be dismissed.