[2012] JMCA Crim 61

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 59, 60, 62 and 66/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

ALTON HEATH
DESMOND KENNEDY v R
MARLON DUNCAN
CHADRICK GORDON

Cecil J Mitchell for the applicant Alton Heath

William Hines for the applicant Desmond Kennedy

Robert Fletcher for the appellant Marlon Duncan

Dr Randolph Williams for the appellant Chadrick Gordon

Mrs Caroline Hay and Miss Christine Johnson for the Crown

17, 18 July and 20 December 2012

BROOKS JA

[1] In an era when gruesome crimes have become almost commonplace, the circumstances that brought about the deaths of Katrina Webb and Simone Vernon, on 20 October 2005, are particularly chilling. The two women and their friend, who will be referred to herein as L, were abducted at gunpoint, from a bar at Newport West in the

parish of Saint Andrew. This was at about 9:00 pm. The three men who abducted them took them to a playfield at nearby Greenwich Town, where other men were awaiting their arrival. L was taken into a bathroom where she was raped by several of the men, as apparently, were the other women. She, however, did not witness that assault.

[2] She was, thereafter, taken out of the building to the playfield, where she and the other women, in the presence of each other, were subjected to further indecent assaults. The question, of what next was to be done with the women, then arose. The question was directed to one of the men, "Moonie". He announced their fate: "[w]e a go carry them up de so go kill them." There was unanimous support for the announcement.

[3] The three women were then marched, naked, to a nearby sewage plant. At the plant, they were taken to the mouth of a large pipe, which went deep into the ground and was used as a conduit to take sewage to the sea. There, L was shot. She heard a conversation between the men, as well as other shots, which suggested that her friends suffered the same fate. All three women were thrown into the pipe.

[4] Only L lived to tell the tale. She survived because, when she was shot, she pretended to be dead. She was thrown into the pipe first. As the liquid washed her down, she got hold of and desperately clung to, a broken portion of the pipe. She used it to prevent her further descent. Whilst there, in the dark, she felt the bodies of both her friends slide past her. The other two women were never seen alive again and,

despite searches, including the use of underwater camera technology, their bodies were never found.

[5] When she thought that it was safe to do so, L climbed out of the pipe. She got assistance and made a report to the police. She attended various identification parades, held at different times thereafter, and she pointed out respectively, Messrs Alton Heath, Desmond Kennedy, Marlon Duncan and Chadrick Gordon, as being among the perpetrators. Mr Gordon was charged with two counts of murder "in the furtherance of robbery or abduction or rape or indecent assault". The others were each charged with two counts of murder committed in the course or furtherance of abduction or rape or indecent assault.

[6] All four were convicted on 15 March 2010 in the Circuit Court Division of the Gun Court at a trial presided over by Smith J. At the trial, L's credibility, as the sole witness as to fact, was the major issue. As a result of the convictions, Mr Gordon was sentenced to death, while each of the others, in respect of each count, was sentenced to imprisonment for life. Those were each ordered to serve 35 years imprisonment before becoming eligible for parole, and their respective sentences were ordered to run concurrently.

[7] All four have applied for permission to appeal against his respective convictions and sentences. For the purposes of this appeal, Messrs Heath and Kennedy are applicants while Messrs Duncan and Gordon are appellants. They will, however, solely for convenience of reference, be collectively referred to herein as appellants.

[8] Several issues were raised by counsel representing the appellants. They include the questions of the admission of prejudicial evidence, the correctness of the imposition of the sentence of death, identification and common design. These issues will be considered during the course of the judgment, but will be done in the context of the complaints by each appellant. It would, therefore, be of assistance to first outline the participation of each appellant according to L's evidence.

1. Chadrick Gordon – He was one of the three original abductors and was known before to L. His mother operated a bar in Newport West and he walked with a limp. He was the man armed with the gun at the bar from whence the women were taken and was the driver of the car used to take them away. He was the one giving directions to the others at the bar. He had sexual intercourse with L and led the way to the place where the sewage pipe was. He told L that his brother had died in a bar in L's area and the women had to die for it.
2. Alton Heath – He forced L to perform oral sex on him and he had sexual intercourse with her. During that interlude, he had a gun, which he pointed at her head and threatened to shoot her. He was present on the playfield when the announcement of the intention to kill

the women was made. He "roughed-up" a little boy who was present on the playfield at the time.

3. Desmond Kennedy – He had sexual intercourse with L, forced her to perform oral sex on him and boasted that he only allowed pretty girls to perform that task. He had a flashlight and encouraged the abductors. L said he was "boosting them".
4. Marlon Duncan – He had sexual intercourse with L and made fun of her. He commented on her breasts and made himself noticed by "going on extra". He also was "boosting" the abductors.
5. All were present when, "Moonie", one of the men in the group, announced that they were going to take the women "up de so go kill them". There was no dissent to the statement.

It is apparent that the jury believed L's testimony in regard to these matters.

Chadrick Gordon o/c Andre Reid

[9] Dr Williams, on behalf of Mr Gordon, concentrated his efforts on two main issues. First, he argued that the verdict was tainted by inadmissible and irrelevant evidence about Mr Gordon's previous convictions. Learned counsel argued that the evidence was wrongly admitted and that the learned trial judge did not adequately

direct the jury to reject it. Secondly, Dr Williams argued that the sentence of death imposed on Mr Gordon was inappropriate.

[10] In respect of the first issue, the evidence about the previous conviction was elicited during cross-examination, by counsel for Mr Gordon. This was in the face of the learned trial judge warning counsel, in advance, of the danger of his tack. Despite that warning, learned counsel persisted:

> "Q. He had a case at Half-Way-Tree for offensive weapon, a knife; isn't that so?
> A. Yes.
> Q. A penknife which was found in his pocket?
> A. I think that was the offence.
> Q. Don't tell me as an investigating officer you didn't check it out?
> A. It could have been dangerous drugs too? [sic]
> Q. Ganja?"

That exchange is set out at page 554 of the transcript. The transcript of the cross-examination continues in a similar vein to page 555, where the learned trial judge brought it to an end, saying:

> "[Counsel], I cannot see the relevance of that in relation to this case. Let's get to the issues that are involved, please."

[11] The learned trial judge dealt with this irrelevant evidence in her summation to the jury. At page 1072 of the record, she said:

> "[The police officer] said he went to Half-Way-Tree, where he arrested Mr. Reid, and he said that Mr. Reid had been charged at the Half-Way-Tree Court for the offence of offensive weapon and other things, **but that is not of any moment to the case. We are not trying him on anything besides what is contained in the indictment**

> **here**. He said the record at Half-Way-Tree had the name Andre Reid." (Emphasis supplied)

[12] We agree with the written submissions on behalf of the Crown that defence counsel's line of questioning must have been carried out on Mr Gordon's instructions. We also agree that, on that basis, Mr Gordon cannot, now, complain that the evidence that he elicited before the jury tended to taint his character. In any event, we find that the learned trial judge's treatment of the questions, at the time and her summation to the jury, would have made it clear that the evidence was not relevant to the task that the jury had to perform. We cannot agree with Dr Williams in respect of this issue.

[13] In respect of the second issue raised by Dr Williams, learned counsel for the Crown conceded that the sentence of death cannot be sustained. This trial was held before the decision of **Peter Dougal v R** [2011] JMCA Crim 13. The court at first instance would, therefore, not have had the benefit of the direction, given in **Dougal**. Nonetheless, the principle that led to the setting aside of the sentence of death in **Dougal**, applies equally to the instant case. Panton P at paragraph [16] set out his reason for that decision. He said:

> "Having concluded that this murder was among the worst of the worst, I have one reservation however and that is in respect of [Mr Dougal's counsel's] complaint that there was no indication that the death penalty would have been considered as an option as there was no notice given. **He said that had he been notified to that effect, he would have attended the sentencing hearing with a different approach in mind**." (Emphasis supplied)

[14] The direction set out in **Dougal**, which generally adopted an approach recommended by the Privy Council in **White v the Queen** [2010] UKPC 22, is that where the prosecution intends to seek the imposition of the ultimate penalty, it should give notice of that fact. At paragraph [16] of **Dougal**, Panton P also said:

> "…As far as Jamaica is concerned, I accept that it is critical that notice [of intention to seek the imposition of the death penalty] be given. However, it is not practical for such notice to be given at the time of committal as at that stage in Jamaica, the Director of Public Prosecutions may not yet have had sight of the file in the case as the evidence at committal proceedings is not usually presented or marshalled by the Director of Public Prosecutions or staff under the control of that office. So soon, however, as the accused has been indicted, the Director of Public Prosecutions should inform the accused and the attorney-at-law on the record. **By the time the accused comes to be pleaded, and definitely before the leading of the evidence has commenced at the Circuit Court, the prosecution should ensure that the accused, his attorney-at-law and the trial judge are informed of the intention**." (Emphasis supplied)

The only distinction in the treatment of Mr Gordon at the commencement of the trial, was that he was indicted separately from the other appellants. As was mentioned before, the counts against him charged him with murder "in the furtherance of robbery or abduction or rape or indecent assault" whereas, the counts against the other appellants omitted mention of the offence of robbery. That distinction in the counts would not have been sufficient notice to Mr Gordon or his counsel, to satisfy the requirement set out in **Dougal**.

[15] Despite the circumstances of these killings, it was inappropriate, in the absence of notice to the defence, of an intention to seek the imposition of the death penalty, for

that penalty to have been imposed. This ground of appeal must, therefore, succeed and the sentence set aside. The most appropriate method of dealing with the matter, hereafter, is for Mr Gordon's case to be remitted to the learned trial judge for re-sentencing.

Alton Heath

[16] The essence of the submissions made by Mr Mitchell, on behalf of Mr Heath, is that there was no evidence linking Mr Heath to the joint enterprise involving the killing of the young women. Learned counsel pointed out that there was no evidence that Mr Heath was one of the original abductors; there was no evidence that he was among the party of men who forced the women to walk to the sewage plant and there was no evidence that he was present at the sewage plant when the women were shot.

[17] Against that background, Mr Mitchell submitted, there was also no evidence that Mr Heath was present when there was mention of killing the women. Learned counsel also submitted that "even if there was some evidence proffered by the Prosecution that [Mr Heath] may have been involved in the rape, no other evidence was proffered against [him] by the Crown". There was no evidence, Mr Mitchell submitted, that Mr Heath was present at the playfield or gave any support when the plan to kill the women was announced.

[18] An excerpt from the judgment in **R v Coney** (1882) 8 QBD 534 at pages 557-558 provides a correct, concise introduction to the law on the issue of common design or joint enterprise:

> "It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, **might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted**. But it would be purely a question for the jury whether he did so or not." (Emphasis supplied)

[19] That excerpt was relied upon by this court in **R v Dennie Chaplin and Others** SCCA Nos 3 and 5/1989 (delivered 16 July 1990). In **R v Dennie Chaplin**, it was argued on behalf of one of the appellants, Mr Howard Malcolm, that the evidence was insufficient "to establish that [he] was a party to a common design to murder the deceased or cause him serious injury".

[20] Forte JA, as he then was, considered these submissions at pages 9–11 of the judgment of the court. He found that the evidence was that Mr Malcolm watched a "most heinous murder committed by his companions, without attempting to arrest their actions or without sounding an alarm", continued in their company, found a hiding place for the deceased's vehicle and failed to make any report concerning the crime. The learned judge of appeal opined that that evidence, "demonstrated that the appellant, far from being accidentally present, was in fact voluntarily and purposely present at the scene and his conduct during and after the commission of the murder, is sufficient evidence upon which the jury could correctly find that he was present aiding

and abetting the others in the act and therefore a participant in the common design to the murder".

[21] Where there is no accidental presence, the consequence of a person entering into an unlawful joint enterprise must be considered. In **R v Hyde** [1990] 3 All ER 892, Lord Lane CJ said at page 895:

> "There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim but, for example, to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident of the burglary. The latter type of case may pose more complicated questions than the former, but the principle in each is the same."

[22] The principle referred to by his Lordship is that a person entering into an unlawful joint enterprise may be held liable for a consequence which he did not intend, but "contemplated and foresaw…was a possible incident of the execution of the planned joint enterprise". The words quoted are taken from the judgment in **Chan Wing-siu and Others v The Queen** [1984] 3 All ER 877.

[23] In **Chan Wing-siu and Others v The Queen**, men armed with knives, invaded a flat occupied by the deceased and his wife. One guarded the wife while the others stabbed the deceased. The wife was also slashed with a knife. The appellants were convicted for the offences of murder and wounding with intent to do grievous bodily harm. They appealed to the Privy Council arguing that the judge had misdirected the

jury by stating that they could convict each of the accused on both counts if he was proved to have had in his contemplation, that a knife might be used by one of his co-adventurers with the intention of inflicting serious bodily injury. The finding of their Lordships in that case, as has been accurately set out in the headnote, is as follows:

> "A secondary party was criminally liable for an act committed by the primary offender which the secondary party foresaw but did not intend, **if he took part in an unlawful joint enterprise and it was proved beyond reasonable doubt that he contemplated and foresaw that the primary offender's act was a possible incident of the execution of the planned joint enterprise**. Whether a secondary party contemplated and foresaw the primary offender's act could be inferred from the secondary party's conduct and any other evidence which explained what he foresaw at the time. **Since the Crown had shown beyond reasonable doubt that each of the accused had contemplated that serious bodily harm might be a consequence of their common unlawful enterprise and since there were no grounds for holding that the possible risk of serious injury was so remote that it could be disregarded, the jury had been properly directed.**" (Emphasis supplied)

[24] At page 882 of the judgment in that case, their Lordships said:

> "Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance on a nuance of prior assessment, only too likely to have been optimistic".

[25] The words used in the headnote of **Chan Wing-siu and Others v The Queen** were adopted by this court in **R v Taylor** (1991) 28 JLR 124 at page 129. An analysis of the respective decisions in those two cases, as well as that in **R v Dennie Chaplin**

and Others, allows the observation that in considering liability, the nature of the unlawful joint enterprise and the circumstances of the individual case must be considered.

[26] In **R v Taylor**, the appellant, armed with a knife, boarded a bus along with two men who were armed with guns. Along the journey, they commenced robbing the other passengers at gunpoint. During the robbery the men armed with guns fired shots killing one of the other passengers. Despite his evidence denying any involvement in the offences, his conviction was upheld. His participation in the robbery, after guns were brandished and the announcement made that it was a hold-up, was found to amount to a strong case of involvement in a common design, in which serious injury was a probable incident. His conviction for murder was upheld.

[27] In **R v Trevor Bennett** SCCA No 64/1989 (delivered 15 July 1991), the applicant said that he had no gun, but went along with men, who were armed with guns, to the victim's house. The tenor of his unsworn statement was that he went there for the purpose of a robbery and not a killing. It turned out that his co-adventurer had been paid to kill the victim. The co-adventurer, in fact, did so. According to the applicant, "I was astonished of [sic] the actions which was [sic] going on". This court held that with the guns being present, "it must surely have been in [Mr Bennett's] contemplation that the guns were likely to be used to protect themselves from anyone who tried to prevent them from completing their plan, or for some other purpose with the possible risk of serious injury".

[28] The next major issue to be considered, in contemplating the matter of common design, is the question of withdrawal from an agreed or likely course of conduct. In order to avoid liability for the events occurring during the course of an unlawful joint enterprise, a participant therein must demonstrate his prior withdrawal from the adventure. Carey JA, in **R v Sutcliffe and Barrett** SCCA Nos 148 and 149/1978 (delivered 10 April 1981), stated the principle at page 13 of the judgment:

> "In our judgment, a person who wishes to show his withdrawal from a joint enterprise must demonstrate by words or action that he is no longer a part of that plan. He must repent effectively."

[29] That principle was also applied in **R v Rook** [1993] 2 All ER 955. In that case, four men, including the appellant Rook, planned to kill a woman the following day. The following day he did not go to the agreed rendezvous point. Despite his absence, the other men carried out the agreed plan. He was convicted for the offence of murder despite his absence and despite his assertion that he never intended to carry out the killing. He said that he thought that if he were absent it would not have been done. The court held, in part:

> "A person who changed his mind about participating in the commission of an offence but who failed to communicate his intention to the other persons engaged in the offence did not thereby effectively withdraw from the commission of the offence and was liable as a secondary party." (Pages 955–956)

[30] In applying those principles to the instant case, it is fair to say that the evidence does not fully support Mr Mitchell's submissions. It is true that L did say that Mr Heath

was not one of the abductors (page 326) and she did testify that he was not one of the persons who went to the sewage plant with the women (page 332). There was evidence, however, that Mr Heath:

a. was along with men armed with guns holding these women against their will at the playfield (page 64);
b. was himself armed with a gun and threatened to shoot L (pages 61 and 64);
c. was present when Moonie announced the fate of the women (page 143);
d. uttered no dissent to or attempt to stop the plan that was announced (page 70); and
e. reprimanded a boy who had called out the name of one of the rapists in the presence of the women (page 144).

[31] Selected portions of the transcript reveal the circumstances leading to the announcement of the intention to kill the women. At pages 69-70, L described the post-bathroom exchanges on the playfield. The relevant portion is set out below:

> "Q. So you were out on the football field and all this [touching, laughing and making fun of the women] is going on, did anything else happen at this point?
> A. They ask Moonie what he is going to do with us.
> Q. Who is they?
> A. The boys and the man them [sic] around us.
> Q. How many of them?
> A. About ten, eleven.
> Q. When you say they, how many of them was [sic] asking?

A. There was one person really asking, but everybody want to know. They were saying yeah, what we a go do with them now.

L then described the reaction to Moonie's announcement:

"Q. Yes, was there any response [to the announcement]?
A. They were saying yeah man, they were pushing him and saying yes carry them guh kill them.
Q. Did anyone stop – did anyone say no, don't do it?
A. No.
Q. Or try to stop Moonie?
A. No miss."

[32] L placed Mr Heath on the playfield at that time. At pages 143-144 of the transcript, the following exchange is recorded:

"Q. Now tell us, when you went outside, at the time when you were going outside, are you able to say where Mr. Heath was?
A. Yes, Miss.
Q. Where was he?
A. He was on the field.
Q. You said you observed him outside as well?
A. Yes, Miss.
Q. What part of him you saw?
A. His face and his body.
Q. What distance was he from you when you were on the playfield?
A. [Seven to eight feet indicated]
Q. Is there any particular reason why you remember him?
A. Yes, Miss.
[A]. He was – there was a little boy there, he call out someone name, he was the person telling the little boy – he was cursing at the little boy telling him not to call anybody name, and badding him up, so I get to focus on him.
Q. On the playing field, how long [were] you observing him?
A. About two minutes."

[33] On pages 144-145 L also answered questions as to Mr Heath's position:

"Q. Where was [Mr Heath], are you able to say where he was at the time when 'Moonie' said, 'we a go kill dem up deh so'?
A. He was in the yard same way, out in the field.
Q. You remember where 'Moonie' was – where he was in relation to where 'Moonie' was?
A. No Miss.
Q. You remember if he said anything or did anything when 'Moonie' was saying that?
A. No."

[34] On those excerpts from the evidence, we agree with Mrs Hay, for the Crown, that there "is some evidence from which a jury could reasonably infer participation in a pre-arranged plan" to kill the women. Mr Heath, on that evidence, undoubtedly:

a. lent himself to a criminal enterprise knowing that potentially murderous weapons were to be carried; in fact he carried one;

b. had contemplated that serious bodily harm might be a consequence of their common unlawful enterprise and there were no grounds for holding that the possible risk of serious injury was so remote that it could be disregarded; in fact he threatened L himself, that he would shoot her;

c. contemplated and foresaw that the primary offenders' acts at the sewage plant were a possible incident of the execution of the planned joint enterprise; this is because he is associated with the query of what was to be done with the women; and

d. did not withdraw or disassociate himself from the announced plan to kill the women and did nothing to prevent it; the fact that the primary offenders moved to another location without him could not have

amounted to a withdrawal. They would have gone there with his tacit, if not expressed, approval.

[35] That evidence being present, and bearing in mind the principles of law set out above, the learned trial judge was correct in leaving to the jury, the decision as to whether each of the appellants, including Mr Heath, was a participant in the common design to kill.

[36] The law in respect of common design also supports the learned trial judge's approach to this aspect of the summation. She directed the jury on the issue at more than one portion of the summation, but did so more comprehensively at pages 931–932 of the transcript:

> " Now, the prosecution's case is that the accused, these accused committed the offenses [sic] together and you have heard a lot about common design and joint or joint responsibility or joint enterprise and [I] am going to just give you at this stage, a working definition of this common design or joint responsibility because I will come back later to tell you a little bit more fully about it.
>
> Where a criminal offense is committed by two or more persons each of them may play a different part. But if they are in it together as part of a joint plan or agreement to commit it then they are each guilty. The words plan or agreement do not mean there has to be any formality about it. An agreement to commit an offense [sic] may arise on the spur of the moment. An agreement may also be inferred from the behaviour of the parties. **The essence of joint responsibility for a criminal offense** [sic] **is that each accused shared the intention to commit the offense** [sic] **and took some part in it, however great or small so as to achieve the aim**. Your approach to the case should therefore be as follows. If looking at the cases of each of the accused you are sure that with the intention

> that I mentioned, they committed the offenses [sic] or took some part in committing them then they are guilty. If however, you are not sure or you do not accept it then you must find them not guilty." (Emphasis supplied)

[37] At other points of the summation, the learned trial judge explained the need to examine the case against each appellant separately. She also reminded the jury of the evidence that when the women arrived in the car at the playfield, there was a group of men waiting. The members of this group asked the original abductors, if these were the women, the inference being that they were aware of the original abduction before the women had arrived.

[38] In the context of the evidence and the law, the summation properly dealt with the issue of common design. Mr Mitchell's submission on behalf of Mr Heath cannot succeed.

Desmond Kennedy

[39] Mr Hines, on behalf of Mr Kennedy, made very similar submissions to those advanced by Mr Mitchell. Unlike the other appellants, who all denied being present at the location, Mr Kennedy, in an unsworn statement at the trial, said that he was at the playfield. He said that he saw a car on the grounds and that he went over to where it was. He said at page 817–818 of the transcript:

> "When me over de, **me never see anyone have sex with any girl**. **And me never have sex with any girl**. Me never have any flashlight or did de near any flashlight. Went back over. Reason why me no tell the police nothing bout any phone call fi try save any girl…[The reason why] [m]e no call any police, me a baller and 'Moony' a gunman

> so me fear a me life. Me just want a fair chance fi me life, your Honour, jury, everybody." (Emphasis supplied)

There does seem to be a contradiction between his statement that he witnessed no offence and his profferring a reason for not making a report to the police. Despite the apparent contradiction, however, his denial of being present when any offence was committed, places him in a similar position to the other appellants, for the purposes of the analysis concerning common design.

[40] The analysis set out above, concerning Mr Heath, applies with equal effect to Mr Kennedy and the other appellants. In his case, the jury would have heard the evidence that Mr Kennedy was:

a. present with a flashlight while guns were on display (page 65);

b. involved in the sexual assault (pages 65, 66 and 119); and

c. present when Moonie made the announcement and, in fact, reacted to it by, "pushing them and seh [sic] yeah, boosting them up" (pages 147, 148 and 366);

[41] The learned trial judge explicitly placed Mr Kennedy's defence before the jury in the context of the issue of common design. She did this at page 923 of the transcript:

> "The Prosecution on one hand is saying that these four men were part of a common design, a joint enterprise and they, together, killed these women. The defence on the other hand, in the case of Mr. Reid – Mr. Reid and Mr. Duncan, are saying that they were not there, they did not participate in any killing of anybody and **in the case of Mr – the case of Mr. Kennedy, he puts himself on the scene but he says he didn't see anything – well, he never saw anybody have sex with anybody and he didn't**

> **participate in the killing of anyone**…." (Emphasis supplied)

[42] We agree with the written submission of counsel for the Crown that Mr Kennedy's "choice not to move to the sewage area cannot amount to unequivocal withdrawal or countermand". This aspect of Mr Hines' submission must fail.

[43] Mr Hines also complained that the learned trial judge gave an unfairly negative view of Mr Kennedy in her summation to the jury. The learned trial judge, at page 964 of the transcript, told the jury that Mr Kennedy "was pushing them up and in some cases boosting up 'Moonie' and saying, "Yeah, Yeah." Learned counsel submitted that in incorrectly saying that Mr Kennedy said "yeah" twice, instead of once, as L had testified, "this could have led the jury to make the wrong interpretation as to Mr Kennedy's involvement in any intention to commit murder".

[44] Mr Hines' complaint was placed in the context that the jury should have been directed to consider what "yeah", as used in the evidence, meant. Learned counsel argued that the use of the word was not unequivocal; that it was, in fact, open to interpretation.

[45] When examined, however, the evidence at the relevant portion of the transcript (page 148), could not have left the jury in any doubt as to the meaning of the word as used:

> "Q. At the time when Mr. Kennedy – when 'Moonie' said carry you go up deh go kill dem, do you remember if he said anything else at that point?

A. He was saying like he was pushing them and seh yeah, boosting them up."

The error by the learned trial judge could not have misled the jury in any way, as to the meaning of that evidence. No miscarriage of justice resulted and, therefore, Mr Hines' submission in that regard cannot succeed.

[46] Mr Hines filed a ground of appeal complaining that the sentence was manifestly excessive. He, however, did not pursue that ground. The nature of the commission of these offences amply justifies his stance. Mr Fletcher, appearing on the appeal for Mr Marlon Duncan, appropriately described the offences as "abhorrent and horrific".

Marlon Duncan

[47] Mr Fletcher, in making the submissions on behalf of Mr Duncan, also pointed to the fact that the evidence was that Mr Duncan was neither one of the original abductors nor one of the persons at the sewage plant. Learned counsel, however, directed the most of his energy to identifying the weaknesses in the identification evidence and his assertion that the learned trial judge failed to delineate the facts of the case as it pertained to Mr Duncan.

[48] Mr Fletcher sought to demonstrate that the circumstances of the sighting of the persons, who were in the bathroom and on the playfield, were difficult. It is in that context, learned counsel argued, that the deficiencies in L's evidence concerning identification are to be viewed. In particular, he pointed out that L testified that she could not give any description of Mr Duncan. Compounding that inability, learned

counsel submitted, L only identified Mr Duncan on the identification parade after asking the participants to take off their headgear and to smile. She said that she identified him by his wide smile.

[49] Based on what, he submitted, were the weaknesses in the identification evidence, Mr Fletcher crafted his first ground of appeal thus:

> "The Learned Trial judge erred in not accepting the no-case submission of Counsel for the Appellant which on a proper and careful assessment demonstrated that the evidence of identification was so tenuous as [to] make it unsafe to be left to the jury."

[50] Learned counsel combined his arguments, in respect of that ground, with his submissions in respect of his second ground, which reads:

> "The Learned Trial judge failed to sufficiently delineate the facts pertaining to the Appellant and in a manner which would enable the jury to properly consider the case against him as distinct from the men generally or any sub-group of them."

[51] The aspects that Mr Fletcher considered as demonstrating the unsatisfactory nature of the identification evidence, included the facts that:

a. Mr Duncan was not known before to L.

b. L did not give a description of Mr Duncan to the police. She did, however, give descriptions of the men who came to the bar.

c. L said that she recognised Mr Duncan on the identification parade by his smile. When asked to describe the smile, she said it was a wide smile.

d. At the trial, L said that she would not have been able to describe Mr Duncan before the trial.

e. L, after identifying Mr Duncan on the identification parade, did not, in her statement to the police, indicate the specific role that he had played in the incident.

f. The lighting both in the bathroom and on the playfield was poor. There was no light in the bathroom and a flashlight had to be used there. On the field, only three of six lights were burning.

g. L was frightened and traumatised.

h. There were at least nine men present at the stage when she was being molested in the bathroom and approximately 11 on the playfield.

[52] On behalf of the Crown, Mrs Hay pointed out the positive aspects of the circumstances of the sightings:

a. Mr Duncan had sexual intercourse with L in the bathroom (page 149).

b. L saw his face in the bathroom for two to three minutes. At that time he was close to her. He, in fact, touched her. (page 149).
c. On the playfield, Mr Duncan, according to L, was "behaving extra, laughing, make fun, even extra than the other rest" (page 68).
d. While on the field, he was making himself more noticable by commenting on her breasts and other body parts. He asked her personal questions and was "laughing and gallivanting" and touching her as well as the other women (page 150).
e. She saw his face for "about a minute or two" while on the playfield. He was "really close" to her (page 150).
f. When the plan to kill the women was announced, Mr Duncan "was boosting them saying, yes, you fi go dead" (page 151).
g. The lighting in the bathroom came from both the outside lights and the flashlight. Admittedly L could not have seen anything in the bathroom by the light from the outside lights alone (page 134).

This observation, Mrs Hay submitted, could not be described as a fleeting glance, and although it was an observation made in difficult circumstances, could not be described as a tenuous sighting. L's observation, Mrs Hay emphasised, was tested and proved on the identification parade.

[53] As this was a case dependent solely on the evidence of visual identification by L, the guidance given in the well known and oft cited case of **R v Turnbull and Others** [1976] 3 WLR 445 is relevant to both the issue of a no case submission as well as to the adequacy of the directions to the jury by the trial judge. Their Lordships in **Turnbull**, stated at page 448 G:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions...[t]he judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

That guidance was applied in this court in **Herbert Brown and Another v Regina** SCCA Nos 92 and 93/2006 (delivered 21 November 2008). Using that guidance as the standard, it cannot be said that the identifying evidence in the instant case "was so poor or had a base which was so slender as to be unreliable and therefore not sufficient to found a conviction" (paragraph 38 of **Herbert Brown**). There was enough material for the learned trial judge to have left the issue of identification to the jury for its consideration. The terms of the direction must now be considered.

[54] Although the guidance from **Turnbull** has often been cited, it would be helpful to once again set it out, in order to assess how closely the learned trial judge adhered to its principles. It is recognised that "the judge need not use any particular form of words". Their Lordships said at page 447 B–E:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more

> identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

[55] Smith J told the jury, at page 956 of the transcript, that "identification is going to be a very crucial and vital issue in the case and I will tell you how you are to deal with identification evidence". She fulfilled her promise when, starting at page 1018 of the transcript, she said:

> "Now you will remember, that Mr. Heath, Mr. Reid, otherwise called Mr. Gordon and Mr. Duncan, they are saying it is a case of mistaken identity, as far as they are concerned. I must, therefore, warn you of the special need for caution, before convicting the accused, in reliance on the evidence of identification. This, Mr. Foreman and members of the jury, is because it is possible for an honest witness to make a mistaken identification, because as you were told in an example, you might see someone that even when you know them, you think it is the person that you have seen and then when you get closer to them you discover it was

> somebody who looked like the person and was not in fact, the person. So, in ordinary common day experience, we do find that mistaken identification can be made and this is so in law and the law recognizes that even an honest witness, can make a mistaken identification.
>
> There have been wrongful convictions in the past, as a result of such mistakes an apparently convincing witness can be mistaken. You should therefore, examine carefully the circumstances in which the identification of each of these accused was made. You will have to take into consideration, such things as how long the witness had the person she says was the person she says is the accused, under observation. At what distance? In what light? Did anything interfere with that observation? Had the witness ever seen that accused person before? If so, how often? How long was it between the original observation and the identification to the police? Was there any marked difference between the description given by the witness to the police, when they were first seen by her and the appearance of the accused? Where there was no description given, ask yourselves, how was this particular accused apprehended and on what basis?"

[56] The learned trial judge then went on to deal with the weaknesses in connection with the identification evidence. Before considering the principles in relation to each of the appellants, the learned judge reminded the jury that L did not know any of the men before, except for Mr Gordon, and that "this incident took place at night and it also took place under extremely difficult conditions" (page 1021). She also addressed inconsistencies in L's evidence concerning the lighting. In that regard, the learned trial judge set out L's explanation for the inconsistencies and left the question of acceptance of that explanation for the consideration of the jury. She said at page 1021:

> "Now Mr. Foreman and members of the jury, do you accept her explanations or is it a situation where it was recognized that without lights being there at the appropriate time, this

> question of visual identification and the case as a whole, would have been in grave problems? These are some of the things you are going to have to consider?"

[57] Mr Fletcher complained that the learned trial judge did not critically assess the evidence in respect of Mr Duncan. On learned counsel's submission, the learned trial judge merely rehearsed the evidence. The submission is unfair to a very commendable summation in this regard and does not consider the summation as a whole. Firstly, the learned trial judge did identify the evidence against Mr Duncan and set it out faithfully at pages 965-966:

> "Now as it relates to Mr Duncan, she said he had sexual intercourse with her as well and recall you know, she's saying that these four before this court had sexual intercourse with her. She said she first observed Mr. Duncan in the bathroom. She saw his face for about two to three minutes. He was close to her. He touched her body. He was in front of her. She says there was nothing blocking her from seeing his face in the bathroom. When they went out on the playing field Mr. Duncan was on the playing field and these, the words she used, 'He was laughing and galavanting and feeling us up.' She said at that stage she observed his face and body and there was nothing blocking her from seeing his face on the field and she said at that stage she observed him for one to two minutes. She said he came close to her. He was [touching her inappropriately]. He was really close to me. She said, 'When 'Moony' said he was carrying us go up so to kill us, Mr. Duncan was there boosting him up saying, yes unnu fi dead.' He was pushing them, these are her words, to do it. She said before that day she had never seen Mr. Duncan...."

[58] Secondly, after giving a full direction in accordance with the guidance in **Turnbull**, the learned trial judge applied the various aspects of that direction to each of the appellants. In respect of Mr Duncan she said at pages 1027–8:

> "As it relates to Mr Duncan, she did not know him before either. She first observed him in the bathroom when he was close to her and she observed his face for some two to three minutes. There was nothing blocking her view of him. He also had sexual intercourse. She was saying that during that period, she was able to see his face. She said her second opportunity of observing him was on the playing field, where again, you had the flood-light. Three of them were on at the time. She said he was laughing and gallivanting. At the time, nothing was blocking her observance of him. She saw his face and body for about one to two minutes on that occasion. She said he came close to her, because he was fondling her…Bear in mind, Mr. Foreman and Members of the Jury, she never knew him before and he was not one of those who were to have been engaged either at the bar or at the sewage areas with her."

[59] The learned trial judge used a similar approach in respect of the various identification parades which L attended. One of Mr Fletcher's complaints was that the identification evidence was weak because, among other things, which have been mentioned above, L said on the identification parade that she had come to identify the man that had sexually assaulted her and "held up the bar". This, Mr Fletcher argued, is despite the fact that she admitted that Mr Duncan was not one of those at the bar.

[60] The learned trial judge addressed the jury in respect of that issue. She said at page 970 of the transcript:

> "And at this point I would just like to say that when persons go on identification parade usually, if there's more than one person involved, they don't know who they are going to see on the parade. The idea is for them to go and identify from a group of persons whether any of the persons they are saying is on that parade. So where you have more than one person involved, they would not know any names. They would go on the parade. They would see this line up of men and the idea was to test to see whether they could identify

> anybody on that parade who they say was involved. The person might be on the parade, the person might not be on the parade. So it's not usual for them to be told that an identification parade is being held for X, Y or Z. Is a different thing than when you have one person involved..."

Had L had more information, about whom she was at the parade to identify, that would surely have been a point for complaint by Mr Duncan's counsel at the trial, and Mr Fletcher, in this court.

[61] The conduct of the identification parades was also generally and specifically addressed by the learned trial judge. She said at pages 954–955:

> "[L] however attended five identification parades....She said on the 3rd of March, 2006 she had also attended an identification parade in respect of Mr. Duncan and from the line up of men on that parade she identified Marlon Duncan as the man who sexually assaulted her...."

[62] At pages 1051–1052, the learned trial judge dealt generally with the need for fairness in the conduct of the identification parade:

> "Now, the objective, Mr. Foreman and members of the jury, of an Identification Parade, is to test the ability to pick out from a group of persons, the person, who the witness has said that she had previously seen on a specified occasion; namely, during the commission of the offences and that those persons participated in the commission of the offences.
>
> The Identification Parades, Mr. Foreman and members of the jury, should be fair. Fairness is the key word in identification parades. Every precaution should be taken to see that they are so. In particular, to exclude any suspicion of unfairness or risk of erroneous identification through the witness' attention being drawn specifically to the suspected person, instead of equally to all persons on the Parade."

At pages 1052–1054 she dealt specifically, in this regard, with the assertions made by Mr Duncan in his unsworn statement:

> "You may recall that Mr. Marlon Duncan, in his unsworn testimony – unsworn statement, told you that he was put on an Identification Parade, where he was pointed out by [L], after she told all the men on the Parade to remove the merinos off their heads and she also asked these men to smile several times. Why? So that she could see them as they smiled.
>
> Now, you will also recall that it was said that this was done in an effort to assist [L] and it was unfair, because what was happening was that he had some teeth missing on one side of his mouth and it is obvious that the witness in asking for the person to smile widely, was looking for something in particular....
>
> So, you have to look at all these things to try and determine whether or not you can consider that these Identification Parades were fair and, especially, in this case of Mr Duncan...."

[63] The learned trial judge also brought the complaints by learned counsel, for Mr Duncan, to the attention of the jury. At page 1011 the learned trial judge dealt with L's response to the suggestions that she was assisted by the police to point out Mr Duncan. The events concerning the removal of the headgear were also addressed at page 1013:

> "[L] said in answer to a question that she was asked by [learned counsel for Mr Duncan], she said when she went on the parade for Marlon Duncan, she said she requested that merinos be removed from their heads but she can't remember if Mr. Duncan's hair had a low-cut and this came up in the case where a witness was called, a photograph was put in evidence of the type of hairstyle he had been wearing and I think that question was directed to the fact that the reason these things were asked -- this request was made on the identification parade is because she was

> looking for some specific features and had been aided to identify Mr Duncan on this parade."

[64] This analysis of the relevant portions of the summation demonstrates that Mr Fletcher's complaints about the summation have been manifestly rendered unfounded by the contents of the transcript. On the contrary, Smith J gave a model direction in relating the **Turnbull** principles to the jury and applying those principles to the evidence given by L. It would have been inefficient of the learned trial judge and wearying for the jury to have repeated the same weaknesses and inconsistencies over and over again in relation to each appellant.

Conclusion

[65] In conclusion, we find that there was ample evidence in respect of identification and common design which was fit for the consideration of the jury. The learned trial judge gave a commendable summation in respect of all the major issues which required the jury's consideration. The issue of L's credibility was squarely placed before the jury for its consideration. The jury, by its verdict, found L to be credible. There is no basis on which that verdict should be disturbed. Mr Gordon's sentence is, however, inappropriate as the prosecution did not give the requisite notice that it would have been seeking the death penalty. That sentence is to be remitted to the learned trial judge for re-consideration. All the other sentences should stand.

[66] On these bases, the appeals by Messrs Duncan and Gordon against their respective convictions are dismissed and the applications by Messrs Heath and Kennedy

for leave to appeal against convictions and sentences are refused. The appeal by Mr Duncan against his sentence is refused. The sentences in respect of Messrs Heath, Kennedy and Duncan, respectively, are confirmed. They shall be reckoned as having commenced on 7 August 2010 and are to run concurrently for each appellant. Mr Gordon's case is to be remitted to the learned trial judge for re-sentencing.