JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 123/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (Ag.)

R v. DALE BOXX

Dr. Randolph Williams for the appellant

Sandra Chambers Crown Counsel for the Crown

July 1, 2, 31 and December 16, 2002

DOWNER, J.A.

Introduction

After a trial lasting five days which was concluded on June 23, 2000, in the Hanover Circuit Court at Lucea, Dale Boxx was found guilty of capital murder and sentenced to suffer death "in the manner prescribed by law". This was a jury trial with Granville James, J., presiding. Dale Boxx was indicted and tried with the co-accused, Robin Murray. Murray was found to be not guilty as no further evidence was adduced against him just before the close of the Crown's case against both accused.

The crucial evidence was given by Carlyle Chambers, the brother of the deceased, Neville Chambers. As related by the learned judge in his summing up the witness said that he was in a bar in the village of Bamboo seated on the

customer side with his back to the front entrance. Further, he stated that there was a back entrance to the side of the building. The building was well lit with electric bulbs and he heard words from his brother. They were watching television and the learned judge stated the situation thus at pages 338-339 of the Record:

> "He said that there was a television set in the bar and that they were watching the T.V. and he demonstrated that the television set was about seven feet from the ground. They were watching the T.V. and that suddenly he heard his brother said, 'Say what this for?' He said that the back door was open and he heard an explosion like a gun shot. He said he turned his head to look in the direction where he heard this sound come from and he got a shot in his neck. He said, that he saw two persons standing at the back door. And this is important you remember Mr. Foreman and members of the jury, I told you about visual identification, that it is important. You have to be careful in deciding the case in relation to the question of visual identification.
>
> Mr. Carlyle Chambers said, I saw the accused Boxx. He said, he saw his face he was about five feet away from him when he saw him and that Boxx was the shorter of the two persons that he saw. And that he saw his face it was not for long but for about twenty seconds." [Emphasis supplied]

Then the learned judge continued the narrative thus at page 340 of the Record:

> "He then heard footsteps coming from the back door and more gun shots and then the gun shots calm down. Then his head was lifted up and he heard like gun shots again and they walked off. He went out to the gate and he saw Neville Chambers his brother the deceased lying in blood at the roadside and his clothes were dirty. Mr. Mahoney asked him further

> question to determine what about his clothes being dirty, and it turned out there was blood on his clothing. A car was stopped a Lada motor car and Neville Chambers was placed in this vehicle the evidence shows that he was taken to Cornwall Regional Hospital, and he died."

As the witness did not know the accused before, an identification parade was held on the 31st July, 1998. The incident was on 8th May, 1998, this was some seven weeks after the fatal shooting. On the Crown's case the witness walked slowly, and identified the accused. This version was given by the witness and the police officer who conducted the parade. It should also be noted that the accused requested his mother to be present and this was granted. The evidence shows that the parade was conducted fairly. The accused had a scar on his forehead, and this was covered over. A similar covering was put on all the other members of the parade, so that the scar could not be seen on the suspect. There was a suggestion but no evidence to support it, that the witness walked more than once on the parade before identifying the accused. The judge generously directed the jury that if that was so then it could either raise doubts as to the correctness of the identification or that the witness was making sure that he picked out the man he saw on the night of the incident.

In the light of the defence of alibi the following aspect at page 353 of the Record is of importance to the defence:

> "The accused asked the Sergeant if he was satisfied for the arrangement for the identification parade and he said yes. The witness Mr. Carlyle Chambers was

> called and he asked Mr. Chambers if he knew why he was there, and Mr. Chambers told him that he was there to identify the person who was the suspect in the murder matter. The Sergeant said, that Mr. Carlyle Chambers stopped in front of the suspect and he said, this is the man and that the accused Boxx said, Officer, Mi nuh know nothing bout it. The identification parade form was signed and it was tendered in as exhibit 2. And as I told you if you want to Mr. Foreman and members of the jury, you can take that form with you when you retire to consider your verdict."

This has to be compared however with the arresting officer's evidence, that immediately after the parade he said (at page 244 of the Record):

> " Officer a Robin Murray trick me and carry me goh deh sah."

On the merits of the case, identification was the issue and as there was a formidable challenge both before the jury and in this court, it is pertinent to examine how the learned judge directed the jury on this aspect of the case.

At the very outset of his summing up, the judge alerted the jury to the importance of visual identification as experience has shown that mistakes were made in this area. He adapted his directions to circumstances of a jury in the heart of rural Jamaica. The learned judge highlighted the issue for the jury, thus (at page 314 of the Record):

> " In this particular case you must ask yourselves the question, was it the accused who is before the court the man who went to the First and Last Bar at Bamboo District and shot and killed Neville Chambers because that is really the issue that you are being asked to determine."

Then the learned judge continued as follows:

> " Now, Mr. Foreman and members of the jury, this brings me to the consideration of the matter of visual identification, what is seen with the eye. You no doubt know that sometimes persons are mistaken about the identity of others. It has happened to me and I am sure it has happened to you at sometime or the other."

In these general directions the learned judge focused on the particulars in the case as they relate to identification. This was how it was put at pages 315-316 of the Record:

> " During the review of the evidence I am going to point out to you particular circumstances relating to visual identification. And it is very, very important that you consider very carefully all aspects of the evidence relating to visual identification. For example, you will give those considerations to the lighting. You will recall that Mr. Mahoney in his examination of the witnesses asked about the location of the lights. He asked about distances. He asked about the length of time that in particular the first witness Mr. Carlyle Chambers had to observe the person whom he said he saw so that he was able to identify him subsequently and you will recall that Mr. Carlyle Chambers said that it was about twenty seconds that he had to observe this person. It is a matter for you, Mr. Foreman and members of the jury. But as the opportunity arises I will point out to you in reviewing the evidence details relating to this question of visual identification but bear in mind the fact that you have to consider that aspect of the case together with the other aspects very, very carefully. In reviewing the evidence, I will remind you of points relevant to the area of visual identification."

Turning to the specifics of identification with the strength and weaknesses pinpointed, the learned judge reiterated the circumstances of the identification thus at pages 319-320 of the Record:

> "They were watching the T.V. and that suddenly he heard his brother say, 'Say what this for?' He said that the back door was open and he heard an explosion like a gun shot. He said he turned his head to look in the direction where he heard this sound come from and he got a shot in his neck. He said, that he saw two persons standing at the back door. And this is important you remember Mr. Foreman and members of the jury, I told you about visual identification, that it is important. You have to be careful in deciding the case in relation to the question of visual identification.
>
> Mr. Carlyle Chambers said, 'I saw the accused Boxx.' He said, he saw his face he was about five feet away from him when he saw him and that Boxx was the shorter of the two persons that he saw. And that he saw his face it was not for long but for about twenty seconds." [Emphasis supplied]

As a matter of law, Ms. Sandra Chambers for the Crown stressed that the learned judge decided that this was not a case of fleeting glance which would have obliged him to take the case from the jury. He directed the jury how to compute twenty seconds, thus at pages 320-321 of the Record:

> "Now Mr. Foreman and members of the jury, some of you might be wearing a watch that has a second hand. I ask you when you go to the jury room to look at your watch let somebody give some sound when the twenty seconds starts and a sound when the twenty seconds finish. Ask yourselves the question, if you look at a person for two (sic) seconds would you be able to know that person when you see that person again under the circumstances that Mr.

> Carlyle Chambers said that he saw this man. Sometimes you know twenty seconds can be a long time. In certain circumstances I suppose it can be a short time. So according to Mr. Carlyle Chambers about twenty seconds when he had the opportunity of looking at this man, and based on Mr. Chambers' testimony there was adequate lighting, because there were two lights. One electric light at the doorway outside, and one light where the water drains off. There was one inside, he said the man had nothing on his face." (Emphasis supplied).

Also to be taken into account as to the reasonableness of the twenty seconds estimate was the time the accused and his companion carried out the robbery and departed ~~from~~ the scene. The owner of the bar Rudolph Russell in his evidence gave an estimate of five minutes.

Then there was weakness in the identification which related to an inconsistency. Here is how the learned judge directed the jury at page 321 of the Record:

> "Now there is an inconsistency here because so far as having anything on his head he later said, in cross-examination that he does not quite remember if he said that the man was wearing a covering over his head. A matter for you Mr. Foreman and members of the jury, an aspect of the evidence that you will consider. And Mr. Carlyle Chambers said, that this accused man Boxx he had a gun in his hand and the gun was pointed right inside the bar. And he said he had never seen the accused before and that he jumped over the step and went into the flowers and he doesn't know what became of Russell."

There were two other inconsistencies to which the jury was directed, thus at page 323 of the Record:

> " In cross-examination Mr. Carlyle Chambers said, that his back was to the front door. The back door was to his side, and he said that at no time was his back turned to the back. His statements to the police was shown to him and he said, that the back door was to the right of him and his back was turned to the door. But if the back door was to the right of him and his back was turned to the door both of them can't be correct. So it is for you to make what you will of it, Mr. Foreman and members of the jury."

When the transcript is examined at pages 31-38 of the Record the witness was emphatic that his back was turned to the front door and he demonstrated to the jury. He also gave an explanation which was that he had made a mistake in the police statement. The other weakness was pointed out in the following way at page 324 of the Record:

> " On the other hand, there is an inconsistency relating to the colour of that accused man. At one time it was said by the witness Carlyle Chambers that it was a brown man that he saw and then at another time before you he is saying it was a black man he saw. Now these are two different things, and you will determine, whether or not you regard that as being an important inconsistency. For my part although, I am not the judge of the facts, and you are the judges of the facts, I think that it is quite important, because it is in fact a vital area of visual identification. Was it a brown man or was it a black man? He gave an explanation. You heard what he said. It is a matter for you Mr. Foreman and members of the jury."

In this jurisdiction there are a variety of skin colours: dark brown, shades into dark and dark shades in black and this fact is demonstrated on pages 52-53 of the Record. He gave an explanation of the seeming

inconsistency under cross-examination. "The brightness of the light makes anything look soh. I said so, but it could be the brightness of the light."

To appreciate the fullness of the learned judge's directions on the weakness in the identification evidence, his general and specific directions on inconsistencies must be recounted. Here are the general directions given at the very outset [at page 316 of the Record]:

> " In this case there are a number of what are known as inconsistencies and inaccuracies where someone says something at one time and at a later stage that same person is saying something that is quite different."

The inconsistencies as they related to differences between the Preliminary Enquiry and the evidence in Court were explained and then the directions continued thus:

> "Evidence given by witnesses at the preliminary enquiry is not relevant to the trial except insofar as his evidence conflicts with his evidence at the trial. If there is a conflict, you the jury have due regard to any explanations offered by the witnesses. You are entitled to take that conflict into account for the purpose of deciding whether the evidence of the witness ought to be rejected as being unreliable either generally or insofar as it conflicts with her evidence in this trial."

Then demonstrating that in life imperfections are inevitable, and suggesting how these imperfections are to be treated, the directions were as follows at pages 317-318:

> "It is always possible to find inconsistencies and discrepancies they might be slight or serious, material

> or immaterial. If these inconsistencies or discrepancies are slight, you could ignore them. Don't pay any attention to them. Say it does not matter."

Then just as the learned judge highlighted the imperfections in the identification evidence, he gave the following specific directions at page 324 of the Record:

> "If a witness is shown to have made or given evidence and an important inconsistency or inconsistencies arise relating to important aspects of the evidence, you are entitled to ask yourselves the question, is this a witness who we should believe on that point or at all? But you I repeat you are the judges of the facts of the case, and it is for you to decide. I will point out to you any discrepancies or inconsistencies in the case, when I am reviewing the evidence in detail."

Despite these careful directions Dr. Randolph Williams was critical, and these criticisms will be addressed when the case-law on identification is examined.

The significance of the cautioned statement

The cautioned statement is part of the Crown's case and it was admitted by the judge on the basis that it was voluntarily given in law. The weight to be attributed to it was for the jury. Dr. Randolph Williams for the accused challenged the judge's treatment of the cautioned statement on the ground that there was a great discrepancy between what was said in the statement and the evidence given by the identifying witness. This discrepancy he contended was never addressed by the judge. To assess the force of this

argument it is helpful to set out the cautioned statement in full. It appears at pages 188-190 of the Record:

> "A. On Monday the 20th of July 1998, at 6:15 p.m. Dale Boxx was cautioned by me Detective Sergeant H. Smalling at the Green Island Police Station in Hanover as follows.
>
> You are not obliged to say anything unless you wish to do so, but whatever you say may be put in writing and given in evidence.
>
> I Dale Boxx wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and whatever I say may be given in evidence.
>
> Friday the 8th of May, 1998 about two o'clock in the evening mi went to Mr. Robin Murray yard at Cacoon Castle in Hanover and him say that him want mi to follow him goh some where him and two other men. Him didn't tell mi where him and the driver of a red Lada motor car. I didn't want to go but I eventually ended up in the car. When we reach on the way him tell the driver to stop at Bamboo, after him stop at Bamboo him tell mi say I must goh inside the bar and order five Craven A and a Guinness. After ordering that mi turn round fi look if he was coming to pay for it and him push mi down. After him push mi down him step up and draw a firearm, mi don't know what type. After him draw out the gun mi hear shots start fire and mi run under one fence and after mi run under the fence mi hear bawling inside of the building and mi continue run leaving him and the next man. When mi did goh a di bar mi could a meck out Mr. Chambers who them call "Ticks" and two others. The barkeeper and a next man mi don't know these two. Mi run goh a mi yard a Content. I didn't know the driver of the car but mi hear them call him "Tuffy" and them say him and Robin a cousin. Wi never leave Mr. Robin Murray yard the same two o'clock so we reach a de bar about 7 o'clock. The above

> statement was read over to me and I was told that I can correct, alter or add anything I wish. This statement is true, I have made it of my own free will.
>
> This statement was taken by me at the Green Island Police Station between 6:15 and 6:45 p.m. 20.7.98 in the presence of Ansel Brown, Justice of the Peace and Corporal Walker. It was read over to the maker who was told of his rights to correct alter or add anything he wished. He made no corrections."

The learned judge made it plain that the Crown adduced this evidence as it placed the accused on the scene of the crime. The accused blamed the shooting on another and Dr. Randolph Williams argued that it was not emphasized by the learned judge, and if the jury believed this, it would have entitled the accused to an acquittal or a verdict of non-capital murder. There was therefore a requirement he contended for a careful direction that the whole statement was part of the Crown's case and if they accepted it in full, then the accused was at the scene of the crime but he took no part in the shooting and therefore could not be guilty of capital murder.

The correct law is not as broad as stated by counsel in the circumstances of this case. In this case the defence was an alibi advanced by an unsworn statement and sworn evidence. The principle advanced by Dr. Williams would have been applicable if there was no evidence from the defence: see ***Lobban v. R*** [1995] 46 W.I.R 291 at 298. The judge should direct the jury that the statement was not an admission but part of the general picture and not evidence of the truth of the statement. It was not given on oath. This is how the common law has evolved in ***R. v. Robin Clive***

Donaldson [1976] 62 Cr. App. R. 59. There was no proper direction on this issue, and the non-direction amounted to a misdirection.

In this jurisdiction, once the judge invited the jury to take the cautioned statement or other exhibits with them on retiring to consider their verdict then the Registrar as a matter of course entrusts the foreman of the jury with the exhibits. This complaint about the cautioned statement is serious, since the jury considered it in the jury room without the appropriate direction.

The jury had to consider the alibi defence at the trial. The accused stated in an unsworn statement that he was elsewhere at the time of the incident and he brought a witness to support the alibi. It should be noted that there is no provision in this jurisdiction for the accused to record his alibi plea with promptitude in writing so that the prosecution can investigate the matter before trial.

There were also questions and answers under cross-examination and the following questions and answers at page 191 of the Record are of importance:

> "Question 3. When you ordered the Craven A where exactly in the shop you were?
>
> Answer: Right over in front of the counter over the customers side.
>
> Question 4: When you went and order the Craven A where were the other men?
>
> Answer: Inside the shop over the customer side.

Question 5: Where did Robin Murray draw the gun from?

Answer: Mi don't know where him took it from.

Question 6: Where exactly in the bar Mr. Chambers was?

Answer: Is a long counter so where the man would a serve mi him woulda on the right side.

Question 7: How long you know Mr. Chambers?

Answer. Long years mi know Mr. Chambers he was friendly with my mother.

Question 8. After the incident at the bar that night did you hear if anyone get shot?

Answer: I heard that three men including Mr. Chambers got shot and Mr. Chambers died."

Here are the directions as regards the cautioned statement at page 328 of the Record:

> " The accused is alleged to have given a cautioned statement which you are entitled to take with you when the time comes for you to retire into the jury room. You can take it and read it you can look at it and see what it says. That is a brief outline of the case for the prosecution.
>
> This cautioned statement, Mr. Mahoney told you, that so far as the prosecution is concerned the most important aspects, the purpose of it is that the accused is saying that he was at the scene of the crime, he is putting himself there."

The learned judge treated Mr. Mahoney's submission as the law on this issue. He should have directed the jury on the effect that the "less important" part of the statement could have on their verdict. As explained earlier it was part of the general circumstances of the case.

Once the learned judge has ruled in the absence of the jury that the cautioned statement was admissible he ought not to give his reasons for so doing. To give reasons might be prejudicial to the accused. See ***Mitchell (David) v. R*** [1998] 52 W.I.R 25. The weight to be attributed to it is for the jury and the jury ought to be told that the circumstances of the taking of the statement are to be taken ~~into account~~. See ***R v Barry Wizzard*** S.C.C.A. No. 14/2000 delivered April 6, 2001. The learned judge complied with this outline in the following way at pages 328-329 of the Record:

> "If you believe that he gave that statement I will review the evidence relating to the taking of the statement and also what the defence is saying in relation to the statement and it will be for you to decide whether or not it was given voluntarily because if it was not voluntary, if the accused man was beaten, he said he was beaten; burst his head. He was beaten with a baton, that he was made to sign this thing that was already written up. If that is so it would not have been a voluntary statement at all and you have no regards to it. You would ignore it and say this man was beaten and his head was burst and then he was forced to sign this piece of paper. You have regards (sic) to it.
>
> Detective Sergeant Smalling is saying, he is saying that he did not hit the accused. No threats were used against him. No coercion, that there was no force used against him or any inducements to make him

> sign the statement but in the end it is a matter for you, Mr. Foreman and members of the jury."

The learned judge reminded the jury at page 344 of the Record:

> "That aspect of what was said in the statement to the police was tendered in evidence as Exhibit 1 and remember I told you that anything that has been tendered in evidence that you wish to take with you into the jury room when you retire you can take it with you such as his cautioned statement such as the question and answer, such as the identification parade form and so forth."

The learned judge did direct the jury to consider the whole statement, thus at page 361:

> "Mr. Foreman and members of the jury, the position is as I indicated to you before, if the cautioned statement or the questions and answers were taken under circumstances where force was used or any threats or any promise made to the accused man, then it would not be a voluntary statement. Voluntariness of the statement is very important. If you belief (sic) that the statement was not voluntarily given or if you have any reasonable doubts as to whether or not the statement was voluntarily given then you reject the statement. You don't pay any attention to it. <u>You only have regard to what is contained in that statement</u>. If you believe Detective Sergeant Smalling and Mr. Ansel Brown, the evidence combined was that no force or threat or promise was used in relation to the taking of the statement and that it was voluntarily given." (Emphasis supplied)

At no point did the learned judge give specific directions as to how to treat what was contained in the cautioned statement exhibited. The three supplementary grounds of appeal and the fourth additional ground were fully argued and we must now address them. There are three reasons for dealing with the grounds

argued. Firstly, both parties have a right to a further appeal and the Board ought to have the benefit of the reasons of this Court if there is a further appeal. Secondly, a reasoned judgment offers guidance on the law to judges at first instance and to the Bar. Thirdly, reasoned judgments are the "pith and substance" of the judicial function. The common law which is based on precedents depends on judicial reasoning. For the common lawyer it is not sufficient to say this is the law. He must know why it is the law.

The Grounds of Appeal

Ground 1 reads:

> "There was real prejudice or risk of injustice to the applicant from the discussions in the presence of the jury of the ground on which objection was taken to the admissibility of the cautioned statements." (pp 112,185 of transcript)

The usual course for crown counsel when opening the case to the jury is not to mention the cautioned statement unless counsel for the accused agrees. When the objection was taken to the cautioned statement, the course of the trial ran thus as stated at page 112 of the Record:

> "HIS LORDSHIP: In the circumstances we will have a Voir Dire to determine the issue of voluntariness this will be done in the absence of the jury, and I am going to ask the jury to depart from the courtroom."

The simpler and preferred way would be for the learned judge to ask the jury to retire, as he was about to make a legal ruling.

The trial within the trial then took place. When the exercise was completed the learned judge ruled thus at page 185 of the Record.

> "HIS LORDSHIP: Mr. Foreman and members of the jury, to those of you who have never had the experience of the courts procedure before, it might seem strange to you that you had been sent out and then the case continued and then you have been called back. It is what is known as I mentioned before a voir dire. I want you to know exactly what has been going on. During your absence a certain aspect of the case was determined a matter of evidence and based on that evidence that I heard a certain ruling was made. You need not trouble yourself to know what was the evidence or what was the reason. All of what I have told you, much of what took place, if not all of it, you will hear of it at sometime."

The explanations of the voir dire were not necessary. These explanations were an irregularity during the course of the trial and ought not to be repeated in future trials.

Ground 2 reads thus:

> "The summing up to the jury by the learned trial judge on the confessions increased the risk of prejudice or injustice to the applicant in that the jury were directed to determine whether or not the statements by the applicant to the police were voluntary and that they had heard the same issues as he had heard on the voir dire (p. 328, 358/9, 361)."

There are two passages in the summing up which give rise to the complaint in ground 2. The first which was cited previously on a different issue runs thus at page 328 of the Record:

> "If you believe that he gave that statement I will review the evidence relating to the taking of the statement and also what the defence is saying in relation to the statement and it will be for you to decide whether or not it was given voluntarily because if it was not voluntary, if the accused man was beaten, he said he was beaten; burst his head. He was beaten with a baton, that he was made to sign this thing that was already written up. If that is so it would not have been a voluntary statement at all and you have no regards to it. You would ignore it and say this man was beaten and his head was burst and then he was forced to sign this piece of paper. You have regards (sic) to it.
>
> Detective Sergeant Smalling is saying, he is saying that he did not hit the accused. No threats were used against him. No coercion, that there was no force used against ~~him or any~~ inducements to make him sign the statement but in the end it is a matter for you, Mr. Foreman and members of the jury."

The second passage reads thus at pages 358-359 of the Record:

> "Cautioned statement tendered in evidence as Exhibit 3 and the questions and answers tendered in evidence as Exhibit 4 and that at this stage when Detective Sergeant Smalling was giving evidence you were asked to leave the room. And you complied, you went out and the case continued. What we would say a trial within a trial. You don't know what took place but it is known in law as a voir dire and the procedure now is that you are to be absent when this aspect of the evidence is heard. All I can tell you, all of the things that took place were repeated when you came back and so all that took place during the voir dire, a trial within a trial. There is no need for me to say anything to you about it and we will continue."

The learned judge was reiterating his error of giving a detailed explanation on the nature of the "trial within a trial". This was a material irregularity.

Another critical defect in this aspect of the summing up was the failure to direct on the full effect of the statement. If accepted, the statement was exculpatory. It is arguable that a prosecutor in exercising his discretion could have refused to adduce the statement as it was in conflict with his only eyewitness. If he elected not to put the statement in evidence he would have been bound to disclose it to his opponent. This is the aspect which was stressed in Dr. Randolph Williams' submissions. He described the difference between the evidence of the sole eyewitness and the cautioned statement as stark. The cautioned statement puts the accused at the front door, the eye-witness put the accused with a gun at the back door. The arresting officer at page 239 of the Record gave an opinion that the bullet holes on the counter appeared as if they were fired from the back door. There was however no direction on this aspect of the evidence to the jury and this evidence was not supported by a ballistics expert. This is surprising as bullet fragments were collected. If the cautioned statement had been omitted the case would be one of the unsupported visual identification evidence against the alibi, then the learned judge would have been obliged to warn the jury about the dangers of returning a verdict of guilty in the absence of supporting evidence.

Ground 3 reads

> "The sentence of death imposed on the applicant was arbitrary. He was not offered an opportunity to present evidence of circumstances in mitigation of the sentence. In its application the mandatory death sentence constituted inhuman and degrading punishment or other treatment."

The approach by way of the Separation of Powers

The substance of Ground 3 is that it calls into question the constitutionality of the 1992 Amendment of the Offences against the Person Act. An appropriate way to approach this important ground of appeal is on the basis of the constitutional theory of the separation of powers, as it pertains to the structure of government and in particular the constitutional independence of the Judiciary. It is the Judiciary which selects the appropriate sentence for any person who is convicted of an offence. This ground also focuses on the relationship between sections 14, 17 and 20 of Chapter 111 of the Constitution.

The principle of the separation of powers is envisaged in section 4(1) of the Order in Council. It reads thus:

> "**4.** (1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order." (Emphasis supplied)

This section was construed in the case of ***R.v. Kurt Mollison No. 2*** S.C.C.A. No. 61/97 delivered 29th May, 2000 which, as regards the punishment permissible since the Constitution came into effect, stipulated that a

discretionary life sentence was an appropriate sentence. This was so because the existing law had to be adapted and modified to preclude the executive from determining the length of the custodial sentence imposed on a juvenile. Equally, the unamended Offences against the Person Act could have been adapted and modified by the Judiciary in cases which had been decided. If those adaptations and modifications had taken place there would have been a recognition that since the Constitution came into effect, the constitutional principle of the separation of powers precluded the Legislature from compelling the Judiciary to impose a sentence of death in every instance where an accused is found guilty of murder. The statute ought to be construed so as to confer on the Judiciary a discretion as to the appropriate sentence in each case. The appropriate sentence may be the maximum sentence of death. This issue will be addressed later.

Also, to be addressed later will be the 1992 Amendment which is in issue. By resorting to the canon of construction - the presumption of constitutionality – the amendment is construed so as to harmonise it with the Constitution which is the supreme law. The critical phrase "to suffer death in the manner prescribed by law" must be construed to harmonise with section 20(1) of the Constitution. In this way the Judiciary will have the discretion provided in the Constitution to impose the death sentence or in the alternative to determine the duration of the appropriate custodial sentence.

Here is how the section 4 of the Order in Council was construed in ***Kurt Mollison No. 2*** (supra) at page 2 in relation to the separation of powers:

> "Implicit in Section 4 which has five sub-sections are the powers accorded to the Legislature to amend or repeal existing laws; the power of the Executive to legislate by Order published in the Gazette to adapt and modify existing laws within two years of the commencement of the Constitution. Also of special relevance to this case is the judicial power to construe existing laws with the necessary adaptations and modifications so that they conform to the provisions of the Constitution, when cases are brought up for adjudication. The emphasis on declaring the law when deciding cases is in marked contrast to the legislative power to make general laws for "peace, order or good governance" and the specific rule making powers of the executive to promulgate delegated legislation on specific subjects. So in the introductory section of the Constitution the concept of the separation of powers is highlighted."

The legislative power to enact general laws on sentence pursuant to section 48 of the Constitution to make laws "for the peace order and good government of Jamaica" is unquestioned. Constitutional government is limited government and this broad and ample legislative power is made subject to the provisions of the Constitution. The specific limitations on the legislative power on sentences are contained in the powers conferred on the Judiciary. Also limitations are to be found in the necessary implications which flow from constitutional history, the words and subject matter of the constitutional instrument.

Here is how Lord Diplock deals with implications in constitutions modelled on the original at Westminster. In ***Hinds v. The Queen*** (1975) 13 JLR 264 at pages 267-268 the position is stated thus:

> "Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it has been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, <u>but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced."</u>
> [Emphasis supplied]

These words are a gloss on section 4 (1) of the Order in Council. Then in an important passage Lord Diplock continues as follows on the same page:

> "Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a Legislature, an Executive and a Judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the Executive or of judicial powers by either the Executive or the Legislature. As respects the Judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the Judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to the effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading – particularly those applicable to taxing statutes as to which it is well established principle that express words are needed to impose a charge upon the subject."
> [Emphasis supplied]

How Chapter 111 of the Constitution expressly confers the power to impose a discretionary sentence on persons found guilty of capital murder.

The judicial power pertaining to the sentence of death is to be found in Chapter 111 of the Constitution which guarantees Fundamental Rights and Freedoms to persons in Jamaica and by virtue of section 25 confers on the

Judiciary the exclusive power to enforce these rights. Section 13 of the Constitution reads:

> "**13**. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

This preamble is of importance as it declares at the very commencement of Chapter 111 that it is concerned with the protection of the rights of individuals. Additionally, it emphasizes that the rights stipulated in the preamble were enjoyed at the inception of the Constitution and that the subsequent provisions of Chapter 111 enshrines those rights and provides a special procedure for their enforcement by way of section 25.

Then comes section 14(1), the first of the protected rights which reads:

> "**14.** (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."

The necessary implication from these words is that the court as defined in section 20(1) in imposing a sentence of death on a person convicted, exercises a discretion in so doing. The sentencing judge may be empowered by the legislature to impose a maximum sentence of death, and by the course of the common law some other custodial sentence. When we examine section 20 (1) the discretionary power of the Court in sentencing is made plain. That section reads:

> "**20.** – (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The superior courts of record are independent and impartial tribunals. They derive their powers from the Constitution and must have discretion in imposing or reviewing a sentence while the Legislature sets the maximum. Where no maximum is prescribed by the Legislature the Judiciary exercises its enlarged powers pursuant to section 20(1) of the Constitution to impose the appropriate sentence. It was this historic common law power now enshrined in section 20(1) of the Constitution that was resorted to in ***Kurt Mollison No 2.*** to impose a discretionary life sentence.

The independence and impartiality of the tribunal is necessary if the requirement of a fair hearing is to be maintained up to the point of sentencing.

After sentence, the Executive takes over. This analysis suggests that a mandatory sentence of death is incompatible with sections 14 and 20 of the Constitution. It may well be that any mandatory sentence does not afford the accused a fair hearing before sentence is imposed and would be incompatible with section 20 of the Constitution. Such a decision is for another day when the matter of the mandatory life sentence is fully argued. In such a circumstance the case of ***R. v. Smith (Edward Dewey)*** [1987] 1 SCR 1045 which is referred to later must be given due consideration. This issue is so important that this Court (Downer, Harrison, Walker JJA) has ordered that the constitutionality of the mandatory life sentence be argued in the cases of ***Keith Carnegie v. R*** SCCA 44/00, ***Renford Daley v R*** S.C.C.A. 43/01 and ***Ricardo Beckford v. R.*** SCCA 64/2001.

Even if counsel fails to take the constitutional point, the Court at its own instance must remind counsel. See ***Baker v. The Queen*** (1975) 13 JLR 169 where the constitutional point was taken at the Privy Council for the first time and ***Kurt Mollison No. 2.*** where this Court directed counsel to take the point on the constitutionality of the sentence imposed by the Juveniles Act.

As for section 25 of the Constitution pertaining to enforcement provisions it reads:

> **"25. -** (1) Subject to the provisions of subsection (4), of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same

> matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.
>
> (3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.
> ...".

By expressly conferring on the Supreme Court, the Court of Appeal and the Privy Council the exclusive power to adjudicate on Fundamental Rights and Freedoms of persons in Jamaica the necessary implication arises that the Legislature and the Executive are debarred from exercising such powers. The proviso to sub-section (2) correctly refers to the existing laws as providing protection for rights similar to those set out in sections 14-24 of the Constitution. This specific reference to existing laws is an acknowledgement of the role of constitutional history in construing the Constitution. Thus Chapter 111 is to be resorted to in instances where the existing statute or common law does not provide adequate remedies.

Chapter VII of the Constitution provides for the security of tenure of the judges of the Supreme Court and the Court of Appeal as well as appeals to Her Majesty in Council; as well as for the Judicial Services Commission for the appointment of Judges.

Sections 14 – 20 of the Constitution are enforced by section 25 of the Constitution by special procedure, but they must be equally enforced in ordinary criminal and civil actions because of section 2, the supremacy clause. Further the courts must take judicial notice of the Constitution as section 2 reads as follows:

> "2. ~~Subject to the provisions of sections 49~~ and 50 of this Constitution, if any other law is inconsistent with this Constitution this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

It is this section, which also gives rise to the presumption of constitutionality as a canon of construction for interpreting statutes where there is a written constitution. Additionally, there is an ambiguity in the provisions of the Offences against the Person Act since the Constitution came into force.

The determination of the length of sentence for a Criminal offence is essentially a judicial function as cited in Hinds.

Of cases which have construed modern post-war Constitutions on the sentencing power of the Judiciary ***Liyanage v. The Queen*** (1966) 1 ALL E.R.

650 is seminal. Here is how Lord Diplock in ***Hinds*** (supra) cites ***Liyanage*** at page 279-280:

> "In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in ***Deaton v. Attorney-General and the Revenue Commissioner*** (1963) I.R. at. pp 182/183), a case which concerned a law in which the choice of alternative penalties was left to the Executive.
>
> > 'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case ... The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of the rule for the courts ... The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive...'.
>
> This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster Model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case (***Liyanage v. R.***)" [Emphasis added]

The emphasis on "*can* not" is an indication that the Board was of the opinion that mandatory sentences are incompatible with Chapter III and in particular section 20 of the Constitution.

It is therefore necessary to examine ***Liyanage*** and the opinion of Lord Pearce. At page 659 His Lordship said:

> "Counsel for the Crown has contended that the decision was wrong and that there was no separation of powers such as would justify it; but in their Lordships' view that decision was correct and there exists a separate power in the judicature which under the constitution as it stands cannot be usurped or infringed by the executive or the legislature."

This ruling in ***Liyanage*** has even greater force in Jamaica where the independent powers of the Judiciary are made explicit in Chapter 111 of the Constitution. Chapter 111 is of special significance as it enlarges the common law powers of the Judiciary especially in relation to sentencing. The enlarged powers under Chapter 111 is additional to those, which result from the constitutional principle of the separation of powers. The additional words of Lord Pearce at page 660 are also pertinent. They state:

> "Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial."

These words with the appropriate adaptations and modifications are applicable to the Amendment to the Offences against the Person Act. Dale Boxx belongs to a class of persons, namely those who are charged with "any murder committed by a person in the course or furtherance of robbery".

There is one other appropriate citation from ***Liyanage*** as follows at page 660:

> "One might fairly apply to these Acts the words of Chase, J. in the Supreme Court of the United States in ***Calder v. Bull*** (1789) 3 Dallas USSC 386. 'These acts were legislative judgments and an exercise of judicial power'."

It is now appropriate to cite the relevant section of the amended Act which is in issue in this case. It reads thus:

> "**2.** Section 2 of the principal Act is repealed and the following substituted therefor –
>
> 2-(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say –
> ...
> (d) any murder committed by a person in the course or furtherance of –
> (i) robbery; ..."

The manner in which the learned judge treated the evidence on this issue will be addressed later. Then the indictment so far as material reads:

> "STATEMENT OF OFFENCE
> Capital Murder
>
> PARTICULARS OF OFFENCE
>
> Robin Murray and Dale Anthony Boxx on the 8th day of May 1998 in the parish of Hanover murdered Neville Chambers in the course or furtherance of a robbery."

It is now necessary to cite two cases from the United States which are referred to in the opinion of Lord Bingham in ***Reyes v. The Queen*** [2002] 2 W.L.R. 1034 at pages 1050 to 1051. The first passage reads thus:

> "In ***Woodson v. North Carolina*** (1976) 428 US 280 the Supreme Court of the United States considered a North Carolina statute which provided a mandatory death penalty on conviction of certain defined categories of murder. The issue was whether such a statute was compatible with the eighth amendment to the Constitution. Giving judgment for the plurality, Stewart J said, at pp 303-305:
>
> > 'A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In ***Furman v Georgia*** (1972) 408 US 238, members of the court acknowledged what cannot fairly be denied – that death is a punishment different from all other sanctions in kind rather than degree ... A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. This court has previously recognized that 'For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offence together with the character and propensities of the offender' ... Consideration of both the offender and the offence

> in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanising development ... While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the eighth amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offence as a constitutionally indispensable part of the process of inflicting the penalty of death. This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case'."

"35. A similar result was reached in ***Roberts v Louisiana*** (1977) 431 US 633 in which the Supreme Court considered a Louisiana statute which also provided a mandatory penalty of death on conviction of certain categories of murder. The court said, at pp 636 – 637:

> 'To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender

> reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions. As we emphasized repeatedly in ***Stanislaus Roberts*** and its companion cases decided last term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offence. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional'."

Although the instant case is specifically concerned with capital murder contrary to section 2(1)(d)(i) of the amended Act, the legislation also deals with cases of non-capital murder. Further, when guidance is given by their Lordships' Board, The Honourable Attorney-General and Parliamentary Counsel may find that guidance useful in preparing legislation for Parliament. It is in this spirit that a further passage from Lord Bingham's opinion is given at page 1052 of ***Reyes*** (supra):

> "37. The need for proportionality and individualized sentencing is not confined to capital cases. ***R v Smith (Edward Dewey)*** [1987] 1 SCR 1045 concerned the compatibility with section 12 of the Canadian Charter of a statute imposing a minimum sentence of seven years' imprisonment on conviction of importing any narcotic into Canada. The Supreme Court of Canada recognized that in some cases (and perhaps in the case under appeal) seven years' imprisonment for such an offence would be appropriate, but held the provision to be incompatible with section 12 because it would in some cases be grossly disproportionate to the gravity of the offence. As pithily put by Lamer J in his judgment, at p. 1073:

> 'This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.'
>
> If a sentence prescribed by law is grossly disproportionate in that sense, it could be justified (if at all) only under section 1 of the Canadian Charter."

This is the courteous way in which the Judiciary addresses the Legislature.

It must be reiterated that Parliament does have the undoubted power to prescribe as a maximum, the sentence of death. However, it is for the Judiciary to select that sentence or some other appropriate sentence to fit the individual, found guilty of capital murder. To merely impose the death sentence in response to the edict of Parliament is in substance a legislative sentence, not a judicial one. In instances where the Judiciary has decided that the maximum sentence of death is not the appropriate sentence because of mitigating circumstances it may well be that the lesser sentence of life will be imposed. This will be after hearing evidence from the accused and examining a social enquiry report. Also relevant will be any other evidence which pinpoints the special features of the accused so that it can be taken into account before sentence is imposed. The Judiciary has never had any problems in imposing the appropriate sentence for manslaughter or causing death by dangerous driving where Parliament ordains a maximum sentence.

The administration of a discretionary death sentence will be new to judges. It will however be based on tried and tested principles. There must be mitigating circumstances, which will warrant a lesser sentence than the maximum sentence of death. The Constitution imposes this onerous duty on the judges of the Superior Courts of Record and the Board. Judicial seminars are regular and sentencing is often a major topic. Efforts are always being made by this Court to formulate guidelines for judges. As an aspect of our independence we choose our own topics at our seminars. Specialists who address us are chosen by us. So we will formulate guidelines on the discretionary sentence of capital murder in due course. After a time, Practice Notes may be issued on the authority of the inherent jurisdiction of the Courts and these will provide guidelines for judges and the Bar.

The case against mandatory death sentence pursuant to sections 17 (1) and 20(1) of the Constitution.

The importance of the theory of separation of powers as a means to answering ground 3 of the Notice and Grounds of Appeal was put to Dr. Randolph Williams in a series of questions by this Court. His principal reliance however was on the case of ***Reyes v. The Queen*** [2002] 2 W.L.R 1034 from Belize which was part of a trilogy of cases dealing with the issue of the mandatory death sentence. The other two are ***R. v. Hughes*** [2002] 2W.L.R 1058 and ***Fox v. The Queen*** [2002] 2 W.L.R 1077 which were from St. Lucia and St. Christopher and Nevis, respectively.

At the outset it must be emphasized that section 17(1) of the Constitution is closely related to section 20 (1) when the issue is the sentencing power of the Court.

Section 17 (1) reads:

> "**17**. – (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

The sentence of death was lawful in Jamaica before the appointed day so it continues to be lawful today. What is permissible in the light of section 20(1) of the Constitution is a discretionary death sentence.

For ease of reference it is appropriate to set out section 20 (1) again. It reads:

> "**20.** – (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The crucial words in section 17 (1) with respect to sentencing are "inhuman and degrading treatment." To sentence a person to death without hearing from him as regards his individual circumstances is inhumane. It prevents the person charged from enjoying the full protection of the law as adumbrated in Section 20(6) of the Constitution.

This section reads as follows:

> "**20.** (6) Every person who is charged with a criminal offence –
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
>
> (e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language." (Emphasis supplied)

To deprive the accused of the opportunity to defend himself in relation to punishment to be meted out to him is in contravention of section 20(6)(b)(c) and it is also inhuman and degrading treatment. It purports to deprive the sentencing judge of his constitutional powers by an Act of legislative edict, which would be unconstitutional. Another feature to note is that there may well be a plea of guilty to a charge of capital murder. In such a case the

mitigating circumstances may be such as to warrant a sentence of life imprisonment or a lesser custodial sentence.

As for section 17(2) of the Constitution it preserves the death sentence after the Constitution came into force. However, the impact of section 20(1) of the Constitution precludes a mandatory death sentence. Once a fair hearing is afforded then the result of that hearing may have the effect of persuading the impartial tribunal to impose a custodial sentence instead of the maximum sentence of death which is irreversible.

There has been authoritative pronouncement in ***Pratt and Morgan v. Attorney General of Jamaica*** **[1994]** 2 A. C. 1 on how death penalty is to be administered. What is at issue in this case is whether Parliament can ordain a mandatory death sentence or whether constitutional power is limited to setting the maximum sentence of death for certain categories of offences described as capital murder. Such a maximum sentence would recognize the discretion which permits the Judiciary to pronounce a lesser sentence to meet the circumstances of each case. It is the Judiciary in dealing with these matters which will set the standards in this difficult area of criminal law.

Ms. Sandra Chambers, for the Crown, in face of the submissions by Dr. Randolph Williams, stated that The Offences against the Person Act as amended ("the amended Act") is the law and should be followed by the Court. The gist of her submissions is that Section 26(8) of Chapter 111 saves the

amended Act. It is a serious contention which must be examined. Section 26(8) reads as follows:

> "**26.**(8) - Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

The section was construed by Lord Devlin in ***D.P.P. v Nasralla*** [1967] 2 All E.R. 161. It is useful in these reasons for judgment to state the relevant passage which was cited by Lord Diplock in ***Baker v. R*** [1975] 13 J.L.R 169 at 177. It reads thus:

> "This chapter [Chapter 111 of which section 26(8) forms part] ... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

It is now necessary to refer to section 26(9) of the Constitution, which reads:

> "**26.**(9) - For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of –
>
> (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or

> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

The amending provison in the Act was enacted in 1992 and was not a consolidating Act or a law contained in a revision of laws. Therefore section 26(8) and (9) are not relevant to the new provision in the Act as amended. The effect of the amendment is to provide for the death sentence as the maximum punishment in a specific category of cases. The principle behind the presumption of constitutionality meant, the amended Act when properly construed conformed to the Constitution. This important issue will be developed later. It is important because the phrase "to suffer death in the manner prescribed by law." Which law? That is where the ambiguity lies. That ambiguity is resolved by recognizing that the Constitution is the Supreme Law and all laws must be in conformity with it.

The Constitutional principle of the Separation of Powers as it relates to the Prerogative of Mercy and a discretionary sentence of death

It is important that the three organs of government be kept within their appropriate spheres. After a trial and two levels of appeals, a person sentenced to death is entitled to benefit from sections 90 and 91 which governs the exercise of the Prerogative of Mercy. This is how Lord Diplock states it in ***Hinds*** (supra) at page 281:

> "The Royal Prerogative of Mercy, which has been exercised in Jamaica since it first became a territory of the British Crown, is expressly preserved by s.90 of the Constitution, which provides that it shall be exercised on Her Majesty's behalf by the Governor-General acting on the recommendation of the Privy Council. It is, as is recognized by its inclusion in Chapter VI of the Constitution, an executive power; but, as an executive power, it is exceptional and is confined, as it always has been since the Bill of Rights, to a power to remit in the case of a particular individual a punishment which has already been lawfully imposed upon him by a court – whether it be a punishment fixed by law for the offence of which he was found guilty or one determined by a judge in exercise of his judicial functions."

Consistent with the constitutional principle of Separation of Powers and section 32(4) of the Constitution, the Judiciary is prohibited from adjudicating in this area which is in the exclusive control of the Executive, whose powers are stipulated in Chapter VI. Sections 90 and 91 read as follows:

> "**90.** (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
>
> (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
> (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
> (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
> (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

> (2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

There is an important addition to section 90(2) in section 32(4) which will be addressed later.

The Judiciary cannot trespass in this area, which is an area of unfettered executive discretion. The Judiciary will already have played its part in trials and appeals. In those trials and appeals, mitigating circumstances are to be considered by the court before imposing a sentence of death. An appeal on the merits of mitigating circumstances is stronger than judicial review. It is in such circumstances that the Executive is empowered to still show mercy if it is merited.

Then section 91 reads:

> **91.** – (1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.
>
> (2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

Be it noted that the record of the case and the judge's report will demonstrate how the judge at first instance dealt with any mitigating circumstance which ought to temper justice with mercy. To reiterate, the issue of whether mercy was properly taken into account would also have been considered at the appellate level.

Section 91 empowers the Governor-General to go outside the record of the case and counsel for the accused or others may address the Governor General by petition on the issue of mercy. It must be recognized that in every instance where there has been a sentence of death the trial judge forwards a report to the Governor-General in conformity with section 91 of the Constitution. What is not permissible, consistent with the separation of powers and a discretionary death sentence is any further intervention by the Judiciary by way of judicial review. Also to be considered is section 32(4) of the Constitution which reads:

> "**32.**(4) – Where the Governor-General is directed to exercise any function in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court."

So the combined effect of the separation of powers and section 32(4) of the Constitution is to prohibit the Judiciary by way of judicial review from interfering with executive clemency.

It is section 1(9) of the Constitution which provides for judicial review of any person or authority. It reads:

> "**1.**(9) – No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.

This provision must be read in the context of the necessary implication in the Constitution that there must be an end to litigation, after the consideration by the Courts and any international tribunal set up by treaty, to which the Executive accedes. Section 1(9) must also be read with the limitations of judicial review expounded by Lord Diplock and Lord Roskill in ***Council of Civil Service Unions v. The Minister of the Civil Service*** [1985] AC 374 at 410. At page 418 Lord Roskill said:

> "But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

The Constitution confines the Judiciary to those matters which are justiciable and recognizes the constitutional powers of the Legislature and the Executive. In refusing to exercise the prerogative of mercy the time- honoured words of the Governor-General are "Let the law take its course."

In so deciding the Governor General issues the death warrant in proper form under the Broad Seal as required by section 33 of the Constitution. To reiterate, the Judiciary have no jurisdiction to review the powers of the Governor-General in the exercise of the Prerogative of Mercy. It should be noted that since in every instance of a sentence of death the matter must be considered by the Privy Council, it is the issue of the death warrant by the Governor-General which is the only lawful means of carrying out the death sentence in Jamaica. It has been the practice for the Secretary to the Governor-General to forward the death warrant to the Office of the Director of Public Prosecutions for the Director to examine the warrant to ensure that it was in proper form.

There is another reason why judicial review by the Supreme Court is excluded in the exercise of the Prerogative of Mercy. Parliament has provided for a reference by the Governor-General to this Court pursuant to section 29(1) of the Judicature (Appellate Jurisdiction) Act.

It is appropriate to set out the section to determine its scope and effect especially pursuant to the special relation to the sentence of death, which is specifically catered for by Section 91 of the Constitution. Section 29 reads:

> "**29**. – (1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either –
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
> (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon.
>
> (2) In the exercise of the powers conferred on him by this section the Governor-General shall act –
>
> (a) on the recommendation of the Privy Council; or
>
> (b) where in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his direction."

It is clear that the section contemplates a distinction between conviction and sentence. To reiterate the Governor-General must consider the exercise of the Prerogative of Mercy once a sentence of death has been imposed by the Court and reviewed on appeal. However, if there is a petition concerning the conviction, then there may be a reference. The instances where there has been a reference on conviction for capital murder has been confined to cases where

there has been a claim that there has been fresh evidence. The consideration being that such evidence might overturn the conviction.

How the learned judge brought the facts of the instant case within the ambit of section 2(1)(d) of the amending Act.

Section 2(1)(d) of the amending Act was cited previously.

In defining murder the learned judge said at pages 309-310 of the Record:

> "The offence of murder is committed where one or more persons by a deliberate or voluntary act or acts intentionally kills another. Such act or acts which result in death must have been done or committed with the intention either to kill or to inflict really serious bodily harm. And there must be no lawful justification or case for the killing."

Then at pages 332-333 the learned judge continued thus:

> "Now, what is robbery? Robbery consists in law of the felonious and forceable taking from the person of another or in his presence against his will of any money or goods of any value by violence or by putting him in fear. So, there has to be a taking from the person or in his presence and there must be force or the fear and against the person's will.
>
> You will recall, Mr. Foreman and members of the jury, that Mr. Russell gave evidence in this case. Mr. Rudolph Russell, the owner of the bar, he told you that shots were fired. He told you that he was scared. He went under the counter and he was lying underneath the counter and he heard a voice above the counter say words to this effect, 'Give mi the money.' He had the till under the counter and he took the till and put it on top of the counter."

Continuing the learned judge said:

> "Now, you noticed that he put the till on top of the counter with the money. He says there was seventy dollars in it not because he wanted to but because he heard this voice say, 'Give mi the money' and because there were gunshots, out of fear he put the money in the till on the counter. Eventually the money was missing. The money was gone and the till was there and it is reasonable to infer that someone who was either the person who said give me the money or someone connected with that person took the money from the till."

The learned judge also gave directions on common design at pages 333-334 of the Record. To my mind these additional directions which were not strictly necessary having regard to the facts of this case ran thus:

> "Now, this would be robbery and if you believe the prosecution case then you will believe that a robbery took place. This brings me to another point. What is known in law as common design. You see when Mr. Carlyle Chambers gave evidence, he said that he saw two persons at the back door. Two of them he said, one was short who he identified as Boxx and he said the other was tall. Now, take for example the question of who took the money. Mr. Rudolph Russell is not able to say who took the money whether it was a tall man or short man or anybody at all who took the money. He is not able to identify that person. The prosecution is saying that the accused Boxx was there. The prosecution is saying based on Mr. Carlyle Chambers' testimony that Boxx had a gun. The prosecution is asking you to infer from the circumstances that the person who said, 'Give mi the money,' was either Boxx himself or somebody connected with him that there was a joint venture, what is known as common design in law."

This further passage in the summing-up was also unnecessary having regard to the provision of the amending Act. The passage ran thus at pages 334-335:

> "Now, if two persons agree or join together to commit an offence and that agreement is carried out and the offence is carried out then each person who takes an active part in the commission of that offence is guilty of that offence. Where two persons embark on a joint enterprise then each is liable criminally for acts done in pursuance of the joint enterprise.
> What the prosecution is saying it does not matter whether it was Boxx whether it was the tall man who demanded the money or who took the money. The prosecution is asking you to infer that whoever took the money that Boxx was part of it and that he was a part of a joint enterprise and there was common enterprise. Of course, this depends on whether or not you agree with the prosecution's case."

Here is how the amended Act states the position on capital murder in instances of common design at section 2(2):

> "**2.** –(2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily 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."

Since only one person remained on trial after the Crown's case was closed, section 2(2) above had no application. Since it was not known who did the taking and who used the words "give mi the money", Boxx, who was identified as the man with the gun, was the principal in the first degree and the other, who was aiding and abetting would also have been a principal: See ***Mohan v. R.*** [1966] 11 W.I.R 29. Accordingly, a direction along such lines

would have been sufficient and appropriate having regard to the facts as recounted by the trial judge. If this was the only defect in the summing up, the application of the proviso would be appropriate.

Is the Offences against the Person Act as amended compatible with section 20 of the Constitution?

Section 3 of the Act as amended reads:

> "**3.**-(1) Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted or sentenced pursuant to subsection (1A), shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this section a person is sentenced to death, the form of the sentence shall be to the effect only that he is to 'suffer death in the manner authorized by law'."

In a jurisdiction with a written constitution as the supreme law, one of the canons of construction for interpreting or construing statutes is the presumption of constitutionality. There are good reasons for this presumption. Bills are drafted by Parliamentary Counsel and are examined and debated in Parliament. The Attorney-General examines bills before they are forwarded to the Governor-General for his assent. In accordance with this presumption, if there is a construction which is in harmony with the Constitution, such a construction ought to be the preferred one. The words "suffer death in the manner authorized by law" in the context of section 3(1) of the amended Act and the provisions of the Constitution, enables this Court to construe section 3

of the Act under consideration in harmony with section 20 of the Constitution which mandates "a fair hearing." This necessarily implies that the judge hearing the case has a discretion as to sentence. This is so because "in the manner authorized by law" must mean since the appointed day in the manner authorized by the Constitution which is the supreme law. So construed, a person shall be sentenced to death when charged with capital murder when the presiding judge finds that there are no mitigating circumstances which would warrant a lesser sentence e.g. life imprisonment. So construed shall is not mandatory but discretionary.

To test the force of this construction it is pertinent to ask what was the position before the 1992 amendment of the Offences against the Person Act. The relevant section of the 1864 Offences against the Person Act reads:

> "**3.** –(1) Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted, shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this subsection a person convicted of murder is sentenced to death, the form of the sentence shall be to the effect only that he is to 'suffer death in the manner authorized by law'." [Emphasis supplied]

Here, as in ***Kurt Mollison No. 2,*** section 4(1) of the Order in Council would come into play. In construing the existing law "the silent operation" of the principle of the Separation of Powers comes to the fore. It is the Judiciary which is empowered to sentence a person and the law would be adapted and

modified to give effect to section 2 of the Constitution, the Supremacy Clause. On a correct reading, therefore, before the 1992 amendment, there was a discretionary power given to the Judiciary to impose the appropriate sentence after hearing from the accused. In section 3 of the 1864 Offences Against the Person Act, the mandatory nature of the word "shall" would be adapted and modified to read "may" so as to accord the Judiciary the exclusive power of determining the appropriate sentence after considering the maximum fixed by Parliament. Ms. Sandra Chambers submitted that both the 1864 and the 1992 Act were in conformity with the constitution. What she failed to do as regards the provisions for capital murder was to give the correct reasons why both the original statutes and the amendments since the "appointed day" conformed to the Constitution. In the case of the amendment by resorting to the presumption of constitutionality and in the case of the original provision by resorting to the construction to adapt and modify to conform with the Constitution.

It must be emphasized that there is a close relationship between sections 20(1) and 20(8) of the Constitution. The relationship is best shown by juxtaposing both sections.

To reiterate section 20(1) reads:

> "**20.**-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Section 20 (8) reads:

> "**20.**-(8) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

In section 20(1) the phrase "fair hearing" is used because in this section if the charge is withdrawn the hearing is incomplete, but it must be fair. In section 20(8) the word "tried" is used to indicate completion which will result either in a conviction which includes sentence or an acquittal.

The substance of the Constitution is that, the imposition of a sentence of death on a person must be by the Judiciary and section 20(1) makes it plain by necessary implication that at the sentencing the judge must have a discretion in so doing. So if this conviction is to be upheld, then the Court would have to hear from counsel concerning the appropriate sentence including the death sentence. So in both the original 1864 Offences against the Person Act and the 1992 amendment there is a discretion accorded to the trial judge in imposing a sentence of death. In the case of the original Act, this discretion results after a process of adaptation and, modification and in the case of the Act as amended, by a process of resorting to the presumption of constitutionality and thereafter selecting the construction which harmonises with the Constitution. In both

instances the trial judge has discretion to impose a sentence of death or some lesser sentence such as a sentence of imprisonment for life.

The issue of identification

Ground 4 reads:

> "Further to my notice dated the 25th June, 2002 in the above matter I submit the following ground:
>
> 4. The purported identification of the applicant by the sole eyewitness was made in difficult circumstances and amounted to a 'glimpse' of a person not known before (p321 line 12-15). In the circumstances the directions of the learned trial judge were inadequate.
>
> He did not adequately instruct the jury on the reasons for caution in assessing such evidence and did not emphasize the special care needed in that aspect of the case compared with other aspects (p 316 line 5-8).
>
> He made no reference to the experience gained in the courts that a mistaken witness may appear honest and convincing.
>
> The circumstances of the applicant's presence in the bar described in the cautioned statement differ from those given by the eyewitness. The learned trial judge did not deal with this discrepancy in the prosecution's case."

The learned judge in the passages cited previously gave careful directions on the issue of identification. However Dr. Randolph Williams highlighted flaws which appear to be serious ones.

The first complaint was that having left the identification issue to the jury on the basis of seeing the accused for twenty seconds the learned judge

did not go on to explain to the jury that the identification was made under difficult circumstances. This was a weakness to be explained to the jury. There was an obligation to point this out to the jury especially since this was a borderline case.

The learned judge did direct the jury to be careful about the issue of visual identification and he did give them an example of mistaken identification in relation to himself. It was a good example but the learned judge should have pointed out that this experience of mistaken identity was not peculiar to himself, but was part of the general knowledge of the Courts. The judge should also have gone further and pointed out expressly the dangers of relying on visual identification especially if there was no supporting evidence in that material particular. The eyewitness gave evidence that he saw the accused at the back door and that he had a gun. It is true that in the cautioned statement the accused put himself on the scene but at the front door. The trial judge should have pointed out that the statement was self-serving and was just part of the circumstances of the case.

Further there was an obligation to emphasise to the jury that identification evidence belongs to a special category where mistakes are frequent. The learned judge should have pointed out that it was therefore desirable to have supporting evidence, and, if there was none, that circumstance should have been brought to the attention of the jury. Again, the judge failed to warn the jury that a mistaken witness may be very

convincing, and that because an honest witness might be mistaken it was dangerous to rely on the unsupported evidence of a single eyewitness or, for that matter, several eyewitnesses.

In deploying those criticisms both counsel relied on ***Junior Reid et al v. The Queen*** [1990] A.C. 367, ***Alfred Flowers v. The Queen*** P.C. Appeal 54 of 1999 and ***Thomas Palmer v. The Queen*** [1992] 29 JLR 17. There seems to have been an omission in this case in eliciting supporting evidence from the sole eye-witness that one of the two men on trial took the money from the till. It is probable that although dead cells or perspiration from the hand on the till would be invisible to the naked eye, examination for D.N.A. might have provided the crucial evidence to support the eyewitness. The omission to call a ballistics expert was imprudent as having regard to the position of the spent shells it could have been ascertained from what vantage point the shots were fired. These issues are raised because it was the duty of the police in the first instance to investigate these matters. If there is a failure on the part of the police then the Resident Magistrate has a duty pursuant to section 64 of the Judicature (Resident Magistrates) Act to direct such investigations. If there has been an omission on the part of the Resident Magistrate, the Director of Public Prosecutions ought to ensure the proper preparation of the case prior to conducting the case for the Crown before the Circuit Court. The incidence of crime, and in particular murder, is so high in

this jurisdiction that the proper administration of the criminal law is of prime importance.

Conclusion

As indicated previously, the applicant suffered some prejudice from the learned judge's summing up generally and more prejudice from the manner in which he directed the jury on the issue of admissibility of the cautioned statement. There was justifiable complaint because the learned judge referred briefly to the fact that what was heard in the absence of the jury would be repeated by and large to them. However, the real complaint by Dr. Williams for the appellant on this issue was that it was never put to the jury that there was a discrepancy between the eyewitness for the Crown who saw the accused at the back door and the assertion in the cautioned statement that the accused was at the front door unarmed on the night of the incident. This lack of direction was a serious misdirection. It should have been emphasized that the alibi was the real defence and the assertion of the appellant in the cautioned statement of being at the front door unarmed was a mere circumstance in the narrative of the cautioned statement. It was not evidence.

The challenge to the constitutionality of the Offences against the Person Act fails. It fails because by resorting to the presumption of constitutionality on a true construction of section 3 of the amended Act, the judge's discretion is acknowledged and, therefore is, in conformity with section 20(1) of the Constitution. Even before the amendment to the Act, judges were empowered

by a mandatory canon of construction enshrined in the Constitution to adapt and modify existing laws to conform with the Constitution. Under the constitutional principle of the Separation of Powers, the discretionary power of judges in sentencing was in existence from the very inception of the Constitution.

Although the learned judge gave careful directions on identification evidence there were omissions from his directions, the most serious being the failure to point out that an honest and convincing witness may be unreliable on the issue of visual identification. So, it should have been pointed out that an honest and convincing witness may be unreliable on this issue. Also, it should be stated that it was desirable to have had supporting evidence in a case like this. In fact there was no such supporting evidence and its absence was never brought to the attention of the jury.

It is against this background and because of the serious issues argued that this application was treated as the hearing of the appeal. In the event the appeal was allowed the conviction quashed and the sentence set aside. A judgment and verdict of acquittal was entered. These are the reasons we promised to put into writing.

PANTON, J.A.

On June 23, 2000, after a trial which had lasted five days, a jury of twelve persons convicted the appellant of the offence of capital murder. He was duly sentenced by the presiding judge, Granville James, J. to suffer death in the manner prescribed by law. A co-accused, Robin Murray, had earlier been acquitted on the direction of the judge as the prosecution offered no further evidence against him.

The appellant has challenged the conviction and sentence. He abandoned the two original grounds filed and has, with our permission, relied on four supplementary grounds. Three of these grounds, filed on June 26, 2002, read thus:

> "a) There was real prejudice or risk of injustice to the applicant from the discussion in the presence of the jury of the ground on which objection was taken to the admissibility of the cautioned statements (pp 112, 185 of transcript;
>
> b) The summing up to the jury by the learned trial judge on the confessions increased the risk of prejudice of injustice to the applicant in that the jury were directed to determine whether or not the statements by the applicant to the police were voluntary and that they had heard the same issues as he had heard in the voir dire (p. 328, 358/9, 361); and
>
> c) The sentence of death imposed on the applicant was arbitrary. He was not offered an opportunity to present evidence of circumstances in

> mitigation of sentence. In its application the mandatory death sentence constituted inhuman and degrading punishment or other treatment".

The fourth supplementary ground, which was filed on June 27, 2002, reads as follows:

> "The purported identification of the applicant by the sole eye-witness was made in difficult circumstances and amounted to a 'glimpse' of a person not known before (p 321 line 12-15). In the circumstances the directions of the learned trial judge were inadequate.
>
> He did not adequately instruct the jury on the reasons for caution in assessing such evidence and did not emphasize the special care needed in that aspect of the case compared with other aspects (p 316, line 5-8).
>
> He made no reference to the experience gained in the courts that a mistaken witness may appear honest and convincing. The circumstances of applicant's presence in the bar described in the cautioned statement differ from those given by the eye-witness. The learned trial judge did not deal with this discrepancy in the prosecution's case."

The prosecution's case

The conviction of the appellant is based on evidence that he was one of two men who entered the First and Last Bar owned and operated by Rudolph Russell at Bamboo, Hanover, between 7 and 7.30 p.m. on the 8th May, 1998, and shot and killed the deceased, after which there was a demand for money. In response to this demand, Mr. Russell placed the till with silver coins therein on the counter. The men removed the money and left.

Mr. Russell had been sitting behind the counter while the deceased was sitting on a stool on the customers' side of the counter. The deceased's brother, Carlyle Chambers, entered the bar and sat near to the back door, with his right side to the said door, and his back to the front door. He ordered drinks for all three of them but the others declined his offer. The deceased was estimated to have been seated at about three yards from his brother. All three were watching a television set.

As soon as Carlyle Chambers had been served the drink that he had ordered, his deceased brother was heard to remark: "what this for" ? That was not a reference to the service of the drink. Rather, the deceased was then looking in the direction of the open back door. Carlyle Chambers heard an explosion like a gunshot. He turned his face in the direction of the back door to see what was the cause of the explosion. He was greeted immediately with a gunshot to his neck. He clutched his neck, dashed for the front door, jumped over the verandah, ran around the back of the shop and stuffed his head under a "flowers root". When Mr. Chambers had turned to see the source of the explosion, he said that he saw two men, one of whom was the appellant whom he had not previously known. The men were on the step and the appellant was the shorter of the two. He saw the appellant's face for about twenty seconds. There were two lights, one was outside at the back doorway where the men were and the other inside the bar above the television set. Mr. Chambers said that the appellant was armed with a gun which was pointing inside the bar.

While the witness was lying at the "flowers root", the men came in his direction, lifted his hand, and stepped in his back, apparently in an effort to confirm that he was dead. After this incident, more gunshots were heard. The deceased was found lying in blood at the gate to the premises. On July 31, 1998, Mr. Chambers pointed out the appellant at an identification parade at the Green Island Police Station. In his statement to the police, Mr. Chambers described the man whom he saw with the gun as being of brown complexion. However, at the trial, he described the appellant as being dark. Following on the identification parade, the appellant was arrested on the 3rd August, 1998, by Det. Cpl. Joseph Spence. When cautioned, the appellant said, "Officer a Murray bait me up sah, trick me, and carry me go deh".

Apart from the evidence of identification provided by the witness Carlyle Chambers, the prosecution relied on a cautioned statement given on the 20th July, 1998, by the appellant wherein he said that on the afternoon of the 8th May, 1998, he had visited Robin Murray, the co-accused, at his residence at Cacoon Castle, Hanover. Murray invited him to accompany him "somewhere" without stating where. Reluctantly, he said, he went with Murray in a car driven by a man called "Tuffy". At Bamboo, Murray told the driver to stop the car. He obeyed. Murray then sent the appellant into a bar to "order" five Craven A cigarettes and a Guinness drink. The appellant placed the order. While he was waiting and looking for Murray to come to settle the bill, Murray pushed him down, "step(ped) up", and drew a firearm. Several shots were fired. The

appellant ran under a fence and went to his home at Content, leaving Murray and Tuffy behind. In the bar, he had recognized the deceased as one of the patrons. There were two other men, including the bartender, whom he did not know. In answer to questions put to him by the police on the 23rd July, 1998, the appellant said that he had known the deceased for many years as he (the deceased) used to be friendly with his (the appellant's) mother.

The defence

The appellant said that he had been working as a farmer in Anchovy, Saint James, and then as a chef in an area known as Border when the police arrested him for this crime. He denied knowledge of the circumstances that led to the murder of the deceased. He said he was beaten and forced by the police to sign the cautioned statement. He described the eyewitness as being mistaken. His employment as a chef was confirmed by Miss Gloria Brown whom he called as a witness.

The issues for the determination of the jury

It is clear that the identification of the appellant as well as the value of the cautioned statement were the critical matters for the consideration of the jury. Both required careful directions from the learned trial judge. Dr. Randolph Williams, for the appellant, has criticized the manner in which these issues were dealt with by the learned trial judge and, consequently, has submitted that the conviction ought to be quashed and a verdict of acquittal entered.

Identification

Reg. v. Turnbull [1977] Q.B. 224 provides the guidelines for directions to juries in identification cases particularly those involving "fleeting encounters": **Reg. v. Oakwell** [1978] 1 W.L.R. 32, at 36-37. A trial judge is required in these cases to warn the jury of the special need for caution before convicting an accused person in reliance on the correctness of the evidence of identification. In addition, a jury is to be told of the reason for the need for such a warning, that is, that in the courts over the years, there have been faulty convictions based on mistaken identification in situations where the mistaken witness was found to be honest; and, further, that even where there are several witnesses, they may all be mistaken, though honest. The judge should also direct the jury to examine closely the circumstances in which the identification has been made, considering matters such as distances, visibility, prior knowledge of the party, and comparison of the description given by the witness to the police at the time with the actual appearance of the person identified.

In addition, if the "quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, ...the judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification" : **Turnbull** (pages 229-230 supra).

In the instant case, there can be no doubt that the identifying evidence is in the "fleeting glance" mode. Further, it was made in very difficult conditions.

These observations are borne out by the evidence of the identifying witness that when he heard the first explosion he turned his head in the direction of the sound and was immediately met with a bullet to his neck. Thereafter, it is obvious that survival became his main priority while he sought refuge outside the bar and as far away as possible. It is during the period of the discharge of the second bullet that the witness claimed to have seen the face of the appellant for twenty seconds. Even if this claim was a credible one, the very difficult conditions cannot be denied.

The quality of the evidence of identification may be seen from the following passages taken from the evidence of Carlyle Chambers while being examined in-chief:

Page 19, lines 23 to 26 and page 20 lines 1 to 5.

"Q. You saw his face for about how long?

A. It was not for long I had was to move.

Q. Yes, but give us an estimate like say from the first time you saw the face?

A. About with twenty seconds.
His Lordship: Did you say twenty seconds or so?
Witness: Yes sir.

A. I had was to move."

Page 22, lines 16 to 20

"Q. Now, you remember the tall one, you only said that you saw the face of the short one but, the tall one, did you see the tall one with anything?

A. I did not have the time to see him. I didn't have the time to see him, I had to grab mi neck."

Page 24, lines 3 to 5.

"Q. Incidentally, before you ran out of the bar, did you see where Russell was or what became of Russell?

A. I could not see nobody that time."

Under cross-examination, when asked if he was engaged in conversation when his brother had bawled out, his response was:

"No sir. When him bawl out say wha dis fah, mi hear the sound come from the back door and mi get shot" (page 39, line 25)

He was further asked:

"Can you describe what this person was wearing?"

He answered:

"You no have no time fi that sir" (page 46, lines 22 and 23).

At page 47, lines 4 to 13, he is recorded thus:

"Q. I am asking if it is a split second.

A. I don't follow what a second is. One glimpse. was good enough

Q. It was one glimpse?

A. One glimpse was good enough. I wouldn't forget that face again.

Q. So, you will agree with me that it was a glimpse and not any twenty seconds as you

said earlier? Would you agree with me you got a twenty..?

A. Twenty seconds is like a glimpse".

Finally, at page 48, lines 7 to 11

"Q. That is after you got the shot?

A. Yes, sir. Just as I spin round so, I get shot and mi see them.

Q. First thing that you did was to clutch your neck?

A. Yes, sir and dig off."

In the circumstances set out above, it is clear that the evidence failed to reach the standard which would have allowed the judge to properly leave the case for the consideration of the jury. In any event, having left the case to them, his directions did not go far enough. The **Turnbull** test was not satisfied. He did say that mistakes are sometimes made in respect of the identification of others, and that it was important for the jury to give very careful consideration to all aspects of the evidence of identification. He also reminded the jury of some of the very difficult conditions in which the identification was made (pages 314-316, 320). However, he did not tell the jury the reason for the need for caution in their approach to the assessment of the evidence; nor did he tell them that an honest and impressive witness may well be mistaken. These failures on the part of the learned trial judge are, in my view, fatal so far as the conviction is concerned.

The cautioned statement

The cautioned statement placed the appellant on the scene. However, there is an explanation contained therein for the appellant's presence, in that he is stated as having accompanied two men including the co-accused in a motor car to the district in which the murder occurred. He is said to have, at the request of the co-accused, gone into the bar to place an order only to find himself shoved aside by the co-accused who then proceeded to fire shots in the bar. According to an answer given by the appellant to the police three days later, he was inside the shop when the incident occurred.

In directing the jury, the learned trial judge ought to have instructed them in relation to the limited value of the cautioned statement. Firstly, he should have pointed out that even if the appellant was present at the scene, the statement indicated that he was not a party to the murder. Secondly, he should have told them that the content of the statement as to the appellant's presence at the scene should not be used to bolster the identifying witness' evidence, especially when it is noted that the accounts of the incident differed significantly.

Conclusion

In the circumstances, I am of the view that the appeal against conviction succeeds. I am in agreement with my learned brethren that the conviction should be quashed, the sentence set aside and a verdict of acquittal entered. Considering the fact that we are making an order to quash the conviction and set aside the sentence, I do not think that it is necessary for me to address the

submissions that were made in respect of the sentence. I should say, however, that I do not find it possible to agree with the views of my learned brother Downer, J.A. in his treatment of the question of the mandatory nature of the death sentence. My own views on the matter have been expressed in the case **Lambert Watson v. R.** (Supreme Court Criminal Appeal No. 117/99).

CLARKE J.A. (Ag.)

I agree that the appeal be allowed, the conviction quashed, the sentence set aside and a judgment and verdict of acquittal entered.