

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 118/2000

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag)

RODERICK FISHER v R

Ms. Janet Nosworthy for the applicant
Herbert McKenzie, Asst. Director of Public Prosecutions (Ag.)
and **Miss Christine Morris**, Crown Counsel for the Crown

May 20, and July 23, 2002

SMITH, J.A. (Ag.):

The applicant, Roderick Fisher was convicted for capital murder on the 6th June, 2000 in the Home Circuit Court before Hibbert J and a jury. The indictment contained three (3) counts. Each count charged him with capital murder. The particulars of offence were that he on the 18th day of November, 1998, in the parish of St. Andrew, murdered Edmond George Andy Stewart (count 1), Errol Fraser (count 2), and Devon Hibbert (count 3) in the course or furtherance of a robbery. He was convicted of capital, non-capital and capital murder respectively and sentenced to suffer death in a manner prescribed by law.

These were gruesome murders. The victims were put to lie on their faces and each of them was shot in the head. This happened at 184 Mountain View Avenue (the "premises") on the 18th November, 1998.

Mr. Simeon Barnett o/c Baugh was visiting a friend Miss Cecelia Pennycooke at the time of the murders. These premises were the business place of the deceased Andy Stewart. On the 18th November, the deceased Errol Fraser drove a Honda Civic motor car and parked it at the premises. He was accompanied in the car by the deceased Devon Hibbert and Mr. George McPherson who gave evidence in the court below. They met the deceased Andy Stewart at the premises. From there the four of them walked to the stadium where they watched a football match. According to Mr. McPherson, they returned to the premises shortly after 9:00 p.m. The gate to the premises was opened by a man he identified in court as Mr. Simeon Barnett. The deceased persons and the witness McPherson entered the premises and were approaching the parked Honda Civic motor car when they were "pounced upon". Mr. McPherson said he heard a voice say "lie down don't look to the front, side, or centre, just lie down". They were forced to lie with their faces on the ground. They were ordered "just keep still". He testified that his pockets were rifled. He was robbed of a wallet, money and a watch. After he was robbed he heard "bow bow" and felt "something sting me in me head". Someone was groaning. He could not move. The siren

sounded. He heard someone say "This one is alive man". He was placed in a vehicle. He realised he was shot in the head. He apparently lost consciousness and when he came to, he was in the University Hospital.

The identity of the assailants was supplied by Simeon Barnett and Ms. Cecelia Pennycooke. Mr. Barnett, a ducoman used to work at 184 Mountain View Avenue as a security guard. On the 18th November about 5:30 p.m. he had gone there on a bicycle to visit Ms. Pennycooke o/c Sissy who had succeeded him. They were sitting on a wall talking when a Honda civic motor car drove in. It was then about 6:00 p.m. Three men were in the car. The driver asked for Andy. The car was parked and the men alighted therefrom. They were joined by Andy. As they, that is, this Andy and the three men who arrived in the car were leaving the premises, someone called to Mr. Barnett. It was the applicant whom he knew as "Spy". Andy and the three men went through the gate and walked in the direction of the Stadium. Spy stopped Andy by a traffic island in the road. Spy and Andy shook hands. Thereafter Andy and the three men walked off towards the Stadium. Spy entered the premises and walked up to where Mr. Barnett and Sissy were. Mr. Barnett said that Spy told him that he did not like how Andy was going on, that Andy was "showing off". He further told Mr. Barnett that Andy had "collected" and did not want to "deal with him". The witness related an incident involving one Delroy who had entered the premises, and later

left with Mr. Barnett's bicycle. Mr. Barnett blamed Spy for Delroy's conduct. Spy told him not to worry because he would recover his bicycle. Spy left the premises and returned about six minutes after. He had Mr. Barnett's bicycle which he returned to him. A man he knew as Chris came with Spy. Mr. Barnett was at that time at the front of the premises by the guard house. Chris and Spy were there. They could touch each other. Spy told them he would not be leaving until Andy returned. He also told them that Andy knew how his friend Merton died. Barnett said Spy told him to close the gate. He refused on the ground that the men who left the car in the premises were coming back after the football match. Spy indicated that he did not want anyone to see him in the premises and he himself closed the gate.

Mr. Barnett told the jury about a dialogue between Chris and Spy in which they discussed the possibility of their leaving the premises from the rear. Thereafter, Mr. Barnett, Chris and Spy sat in front of the guard house. Spy asked him which vehicle belonged to Andy. The witness told him that Andy did not drive any. Spy did not accept that answer and kept asking him if a certain car did not belong to Andy. Spy also questioned him about the surrounding buildings. The witness went on to describe a long conversation he had with the applicant Spy. According to the witness the spot where they were, was brightly lit by street lights and electric light from next door. Spy took a tam from his pocket and

remarked that "any time him put on dis tam, people dead". Spy told him that when the men returned from the football match he must open the gate. The witness said he got up and went inside the guard house and lay down. Spy and Chris followed him into the guard house. Spy was admiring the house when Sissy entered. Mr. Barnett went outside to eat. Shortly after, Spy and Chris joined him outside. Spy said he was not leaving until Andy returned.

It was about 9:00 p.m; the match was over. People were leaving the Stadium. Spy and Chris were standing at the door of the guard house. The witness heard Spy say "See dem a come yah". Spy and Chris went into the guard house. Andy and his three friends were at the gate; Andy was trying to open the gate. Mr. Barnett stated that Spy pointed a gun at him and said "gwaan go open di gate". He did as he was told. Mr. Andy and his three friends came through the gate. They greeted Mr. Barnett and went towards the Honda Civic motor car. They passed the guard house and when they were about three yards away he saw Spy and Chris come out of it. They were behind the four men. They spoke to the four men. He did not hear what was said. He saw the four men lie face down on the ground. Spy went to the gate and closed it. He went back to the men on the ground. He searched Andy's pocket. He removed something from Andy's pocket and put it in his (Spy's) pocket. He again put his hand in Andy's pocket and " come up with toilet paper"

He then searched the other men. He went back over Andy pointed his gun at Andy's head. The witness said he saw a "ball of fire" coming from Spy's gun and heard a loud explosion. Spy's gun, he said, was about six inches or less from Andy's head when he saw the "ball of fire". Mr. Barnett said he ran out the premises and ran down Mountain View Avenue. As he ran he heard about three or four more explosions. He turned back sometime after the explosions stopped. He saw Sissy coming out of the premises. They spoke and then went to the Stadium Police Station where they made a report. They returned to the premises accompanied by the police. There he saw two of the four men on the ground; Andy was one of the two. Blood was flowing from his neck. He was dead. The bodies of Andy and the other man were removed by the mortician. Mr. Barnett testified that he knew Spy from Spy was about five or six years old, that is, over twenty years. He knew where he lived and knew his mother very well. He said from the time Spy came to the premises to the time when he (Mr. Barnett) ran out of the premises was about one hour fifteen minutes. He saw his face during all that time.

On the 25th November, 1998 Mr. Barnett identified the applicant on an identification parade as the person he called "Spy".

Miss Pennycooke, the other eyewitness, worked at 184 Mountain View Avenue, as a security guard. On the 18th November, 1998 she got to work around 5:00 p.m. Shortly after she arrived her brother-in-law Barnett

joined her. Just before 6:00 p.m. a red car drove into the premises. Someone in the car asked them for Andy. Andy who was upstairs came down and spoke to them. Three men were in the car. The car parked. The three men alighted and with Andy they went through the gate and walked towards the Stadium. When they reached a traffic island she noticed Andy holding the hand of the applicant. Then Andy and his three friends continued walking. She heard the applicant call "Barnett" and then he entered the premises where the witness and Mr. Barnett were. The applicant sat beside her. She heard the applicant tell Barnett that Andy was "showing off on him". He told them that Andy was responsible for his friend's death. He made other accusations against Andy. An argument ensued and then the applicant said "man fi dead back fi him fren, Andy fi dead fi him fren". The witness said she then saw a man on the street; this man called to the applicant and then entered the premises. The man and the applicant spoke. This man left on Barnett's bicycle and rode down Mountain View Avenue. Barnett spoke to the applicant about this man taking away his bicycle. About five minutes later the man returned with the bicycle. She told the Court about the applicant and this man talking to one Mr. Gordon, and begging for money before Mr. Gordon drove out of the premises. She said Barnett then went into the guard house followed by the applicant. Ms. Pennycooke said she also went inside the guardhouse. She described

what took place in the guardhouse and thereafter when the applicant came out of the guardhouse. Her evidence is that the applicant, Mr. Barnett, another man and herself were on the premises until Andy and his three friends returned from the football match. Before Andy and his friends came through the gate, the applicant and the other man went back into the guardhouse. After Andy and his friends had passed the guardhouse the applicant and the "other man" came out of the guardhouse and went in Andy's direction. She heard the applicant speak and saw Andy and his friends "spin around one time". They were facing the applicant and his cohort. She said she then saw the four men "go down on their belly". She saw the applicant take things from Andy's pocket and put them into his pocket. The other man joined the applicant rifling the pockets of the men on the ground. She said the applicant rifled the pockets of two of the men and his companion did likewise to the other two. Then she said the applicant went and stood over Andy's head and his companion did "the same thing at the next end". The men were lying in a line.

According to the witness the applicant "took two of the men just like when robbing them" and his companion whom she described as the man in the mask "took" the other two. Her evidence continued thus:

Q: What happened next?

A: ... I heard explosion.

Q: One explosion?

A: Several sir.

Q: Where did those explosions come from?

A: It coming from the said spot where the man them lay down.

Q: What the explosion sound like?

A: Gunshot sir.

Q: What happened after the explosions?

A: After the explosions, I heard no sound. When I look around the four men were lying on the said spot sir.

Q: How were they lying?

A: The said condition what the man put them.

Q: Still on their bellies?

A: Yes, sir."

The witness said she came off the step where she was standing and went where the men on the ground were. By then the applicant and the other man had left. What she saw and described was nothing but macabre:

Q: Did you notice anything about them?

A: Yes, sir. When I look I saw Andy head were mash, were bleeding everything was running from his head.

Q: Did you notice the three other men?

A: Yes Sir, when I look one of Andy shoes kick off his foot the next men the big fat one was going like "when somebody drawing snore and I went to the gate".

At the gate she saw Mr. Barnett. She told the trial Court that she did not know the applicant before. She said that from the time he came through the gate into the premises she had been admiring his eyebrows. She testified that the applicant came to the premises before nightfall and that during the night the place was well lit and she could see his face. He was within arm's length from her at times.

On the 25th November, 1998 she identified the applicant on an identification parade as the man who on the 18th robbed and shot the men at 184 Mountain View Avenue.

Mr. Canute Stewart, Mrs. Yvonne Lewars and Miss Sophia Richardson attended the hospital morgue and identified the bodies of the three deceased persons, Andy Stewart, Devon Hibbert and Errol Fraser, respectively to the doctors who performed the post-mortem examinations .

Dr. Ere Seshaiyah a registered medical practitioner and a forensic pathologist testified that on the 26th November, 1998 he performed a post-mortem examination on the body of Edmund George Andy Stewart. The examination revealed one gunshot wound to the head. The entrance wound was on the left temporal area. It travelled through the underlying bone entered the cranial cavity and exited at the right temporal area. In his opinion the cause of death was the gunshot wound to the head. Death would be immediate. The doctor said that two centimetres

powder burning was present around the wound. That, he said, indicates that the distance between the deceased and the muzzle of the gun was about six inches.

Dr. Prasad Kadiala, a registered medical practitioner and a forensic pathologist performed post-mortem examination on the body of Devon Hibbert. There were two gunshot wounds:

- (1) an entrance gunshot wound on the left occipital region of the head, without gunpowder deposition. The projectile travelled through underlying bone cranium and lodged in the left frontal lobe of the brain. He recovered a deformed copper leaded bullet which was handed over to the police Sgt. Bent;
- (2) an entrance gunshot wound on occipital region of the head without gunpowder deposition. It travelled through the underlying bone and lodged in the frontal lobe of the brain. The lead bullet and copper jacket of the projectile were recovered and handed over to Sgt. Bent.

The cause of death was multiple gunshot wounds to the head. Death would be immediate.

On the 20th November, 1998 Dr. Tracy Gibson, a resident in pathology at the University Hospital performed a post-mortem examination on the body of Errol Fraser. She described an entry gunshot wound which she found on the right side of the scalp. There was a

fracture of the right parietal bone of the skull. A 9mm diameter bullet was recovered from the left side of the brain and handed over to Sgt. Alvin Bent. In the doctor's opinion the cause of death was severe head injury which was consequent on a gunshot wound to the head.

Detective Sgt. Alvin Bent was the investigating officer. On the 18th November, 1998 about 9:20 p.m, he got a report from Miss Pennycooke and Mr. Simeon Barnett. Along with other detectives he accompanied them to 184 Mountain View Avenue. There he saw the bodies of Andy Stewart and Devon Hibbert lying on the ground. They had gunshot wounds to the heads and appeared to be dead. From there he went to the University Hospital where he saw the dead body of Errol Fraser with gunshot wounds to the head. The following morning he and homicide detectives returned to 184 Mountain View Avenue. They conducted a thorough search of the area. At the spot where he had seen the body of Andy Stewart Detective Sgt. Bent said he found an expended bullet - a war-head. This war-head was placed in an envelope which was sealed and marked "A".

On the 20th November, Sgt. Bent attended the University Hospital where a post-mortem examination was done on the body of Errol Fraser by Dr. Gibson. He received a container with a war-head from the doctor. He placed the container with the war-head in an envelope which he

sealed and marked "C". He also wrote the name of the accused and other details on the envelope.

On the 22nd November, 1998, the applicant was taken to the Stadium Police Station by his mother. Sgt. Bent cautioned him and told him that he was investigating the murder of three men and that he had information that he, the applicant, was implicated. The applicant did not respond. Sgt. Bent also told him that he had warrants for his arrest but that he would be placed on an identification parade before the warrants were executed.

On the 25th November he received information from Sgt. Payne. Consequently on the following day he went to the Half-Way-Tree lockups and there he executed the warrants against the applicant. After he was charged and cautioned, the applicant said "a set them set me up".

On the 26th November Sgt. Bent attended a post-mortem examination of the body of the deceased Andy Stewart. This was done at the Spanish Town morgue by Dr. Sessaiah. On the 3rd December he went to the Spanish Town morgue where a post-mortem examination was performed on the body of Devon Hibbert. He received from Dr. Prasad two expended bullets- one copper and one silver, as also fragments from expended bullets. He placed these in an envelope which he marked 'B'.

Sgt. Bent took the three envelopes marked 'A' 'B' & 'C' to the forensic lab and handed them to the ballistic expert, Detective Sgt.

Harrisingh. He returned to the lab and retrieved the envelope. He received from the ballistic expert a certificate signed by the expert. The envelopes with their contents and the ballistic certificate were tendered in evidence. Det. Sgt Carlton Harrisingh, the Government Ballistic Expert testified that on the 14th December, 1998 he received two sealed envelopes 'A' and 'B' from Sgt. Bent. On the 28th December he received another sealed envelope marked 'C' from Sgt. Bent. The envelope marked 'A' contained one .38 special fired copper semi jacketed firearm bullet, damaged, 5 lands and grooves right twist. The envelope marked 'B' contained one .38 special fired firearm lead bullet, damaged, 5 lands and grooves right twist. In the envelope marked 'B' were also one 9mm fired copper jacketed, firearm bullet damaged 5 lands and grooves, right twist weight 130 grains (B1), one fragment of a .38 special fired firearm lead bullet with two lands and grooves visible, right twist weight 19.5 grains (B2) and one fragment of a .38 special fired firearm lead bullet with 2 lands and grooves visible, right twist weight 17.5 grains (B3). The other envelope marked 'C' contained one 9mm fired copper jacketed firearm bullet, damaged 5 lands and grooves right twist, weight 130 grains.

He further testified that examination disclosed that 'A' was discharged from a firearm of the class of a .38 special Smith and Wesson revolver. Examination of 'B' disclosed that it was discharged from a firearm of a class of a .38 special Smith and Wesson revolver.

Examinations disclosed that (B1) was discharged from a firearm of the class of a 9mm Smith and Wesson semi- automatic pistol. B2 and B3 were fragments of a .38 special firearm lead bullet that was originally 5 lands and grooves and discharged from a firearm of the class of a .38 special Smith and Wesson revolver. Examination of 'C' disclosed that it was discharged from a firearm of the class of a 9mm Smith and Wesson semi-automatic pistol. Microscopic comparison of bullets from 'A' with 'B' disclosed matchings of the striations suggesting that 'A' and 'B' were discharged from one and the same firearm believed to be a .38 special Smith and Wesson revolver. Microscopic comparison of bullets from 'B1' and 'C' disclosed matchings of the striations suggesting that 'B1', and 'C' were discharged from one and the same firearm believed to be a 9mm Smith and Wesson semi automatic pistol. Microscopic comparison of bullet fragments from B2 and B3 with 'A' and 'B' disclosed class characteristics which are measurable features of a specimen which indicated a restricted group source. They resulted from design factors and therefore determined prior to manufacture suggesting that B2 and B3 were fired from a .38 special revolver of the class of 'A' and 'B'.

A .38 Smith and Wesson revolver and a 9mm Smith and Wesson semi automatic pistol are classified as handguns. He identified the exhibits in court as those he received from Sgt. Bent.

Sgt. Oswald Payne testified that on the 25th November, 1998 he conducted an identification parade at the Half Way Tree lock-ups. The applicant was the suspect. The applicant's attorney-at-law was present and also a Justice of the Peace – Mr. Peters. Both Miss Pennycooke and Mr. Barnett positively identified the applicant as one of the two men who shot and killed the men at 184 Mountain View Avenue.

The Defence

The applicant made an unsworn statement and called two witnesses. He told the Court that he was a construction worker and that he lived at 26 Roxborough Avenue. He stated that about 5:30 p.m. on the 18th November, 1998 he was at Roxborough and McIntosh playing football. He stopped playing at 6:30 p.m. and went home. He had dinner in his room. He was leaving his room when he heard an explosion in the direction of the Stadium. He went on the road. He spoke to a man who owned a shop at the intersection. After that he went to Roxborough and McIntosh. There he met a group of men coming from a match at the Stadium. Some of these men were in a shop drinking. One of them, he said, approached him and told him that some gentlemen "got shot up by Mountain View". He went to his friend's yard at 13 Lancelot Avenue. From there he went to 30 McIntosh Avenue and then he went back to Roxborough. He spoke to a friend at the shop and then went home. His defence was an alibi.

Mr. Bryon Jakes, a shop keeper, testified that he lived and carried on business at 30 McIntosh Avenue near the Stadium. He knew the applicant as "Fisher" for over 20 years. On the 18th November, 1998 Mr. Fisher came to his shop. It was night- minutes to 8:00 p.m. He bought cigarettes and was there for a while talking to two young ladies. He thereafter went across the street sat on an old fridge and was there talking to another lady until after 9:00 p.m. when he left. The purpose of Mr. Jakes' evidence was to support the alibi defence of the applicant.

The other witness for the defence was Mr. Owen Marquesse o/c Troy, an electrical welder who was living at 37 Roxborough Avenue. He did his welding at 3 Roxborough Avenue. A bar and a shop were also on those premises. He testified that he knew "Baugh" – Mr. Barnett - for over six years. On the 18th November, 1998 "sometime after seven", Baugh came to the bar at 3 Roxborough Avenue. Baugh was in the bar for sometime drinking. Mr. Marquesse said he was at the back of the bar doing welding but would go to the bar every 20 minutes to see that everything was all right. He told the trial court that whilst he was at the front he saw a group of men running. He and Baugh joined them and started to run also. They were running towards Upper Mountain View Avenue. According to him, Baugh said "it look like up at my workplace something happen". After that he did not see Baugh again - he was lost in the crowd. The witness said he went to the "scene where the incident

took place". It was on Mountain View Avenue, but he could not remember the number. There he saw a large crowd and many policemen. The purpose of Mr. Marquesse' evidence was to impeach the credibility of Mr. Simeon Barnett.

Application for leave to appeal

On the criminal Form 1 the applicant stated two grounds of appeal:

1. Unfair trial
2. The verdict is unreasonable having regards to the evidence

No supplemental ground of appeal was filed. When the application came up for hearing Ms. Janet Nosworthy an experienced and very competent counsel told this Court that she had carefully examined the transcript of the evidence and the summing-up of the learned trial judge and was unable to find any fault with the judge's summing up. Counsel for the Crown, Mr. McKenzie, Assistant Director of Public Prosecutions (Ag.) agreed with the view expressed by Ms. Nosworthy. We too have examined the evidence and the summing-up and are of the view that the learned trial judge's directions to the jury were fair, correct and adequate.

The learned trial judge identified the real issues for the jury. At p. 404 of the transcript he told them:

" Now, this case has two aspects to it. One aspect deals with visual identification having

possibilities of mistake; the other deals with the truthfulness of two primary witnesses for the prosecution, those two primary witnesses being Mr. Barnett and Miss Pennycooke. In one breath the defence is saying Mr. Barnett is lying. Also, what we are about to embark on in my directions to you is in relation to identification."

No doubt for emphasis, the learned judge rephrased the above, he said at p.405:

"Now in this particular case, as you recall, the defence is saying it is not this man. Now, they are saying so but for two different reasons, the first in relation to Mr. Simeon Barnett. They are saying that Mr. Barnett, in other words, is not speaking the truth about what happened that night because the defence is suggesting that Mr. Barnett was at a shop and was not present when this incident took place, so, in other words, Mr. Barnett is lying. The second aspect is that it was suggested to Mr. Barnett that he does not know this man and therefore the question of the identity of the person whom he said he saw would come into issue. Also, in relation to Miss Pennycooke, it was suggested that Miss Pennycooke was elsewhere so the question of identification would also be a lie (sic) in relation to Miss Pennycooke".

The learned judge then proceeded to give the jury the full **Turnbull** directions. He assisted the jury to apply these directions to the evidence. The directions given to the jury on the issue of credibility were also full and adequate. In this regard he spent some time directing the jury on how to deal with inconsistencies and discrepancies – pages 399- 405 of the Record. The learned trial judge was at pains to identify the discrepancies and contradictions in the evidence of the two main Crown witnesses.

The judge's directions to the jury as to how to treat with the alibi defence cannot be faulted (pp. 411 – 412). The judge dealt with the significance of the evidence of the ballistic expert, Sgt. Harrisingh, and the evidence of the doctors in this way – pp. 465 – 469:

"Now, when we look at the examination and the findings of the expert we see something similar. He said bullet A, that is the one now which was found where Andy's body was, was the discharged bullet from a .38 Smith Special, Smith and Wesson revolver. He said bullet B, the damaged bullet was discharged from .38 Smith and Wesson revolver.

He said there was another bullet in that envelope marked B and he called B1 and he said that it was a damaged bullet discharged from a 9 millimeter Smith and Wesson semi – automatic pistol, that is a firearm which is different from the Smith and Wesson revolver. So that one, if you accept it, Madam Foreman and members of the jury, is that there were at least two firearms used. Now he said there were fragments two in B1 and on examination it shows that this fragment came from a 9 millimeter Smith and Wesson semi-automatic pistol. If you accept that again,

Madam Foreman and members of the jury, I am sorry, B1 one is the bullet, both fragments were B2 and B3 were fragments from a bullet from a .38 special Smith and Wesson revolver. What we have is that Mr. Hibbert was shot twice and it would now appear from the bullets that were extracted that he was shot with different weapons. Now in relation to C, that's a bullet recovered from Mr. Fraser's he said this was discharged from a nine millimetre Smith and Wesson semi-automatic pistol. So we have two weapons involved here, madam Foreman and members of the jury.

We have a 9mm semi-automatic pistol and a .38 revolver.

Now, let me take you back to something I said earlier today – this morning – about capital murder. Remember I told you it is capital murder in respect of the first. Once you find a murder is committed it is murder in respect of the person who actually caused the death or inflicted injury or attempted to inflict injury or used violence. Now, this accused man is charged on three counts of capital murder. Now, if you find that murder was committed – first, if you find that it was committed in the course or furtherance of a robbery then you will have to go now to find, firstly, whether or not this accused man was involved. If you find that he was involved in this murder, and remember he was not alone according to the prosecution, then you must find whether or not he caused the death of any of these three persons. Now, you remember the evidence of Mr. Simeon Barnett. If you accept that evidence that this accused man pointed his gun at Mr. Andy's head and fired, then that would be evidence that would or could lead you to say that this accused man would be guilty of capital murder in respect of Mr. Andy Stewart. But you must also bear in mind if you accept, again, Sgt. Bent that he found this bullet where Mr. Stewart was lying, if you draw the inference that this bullet must have come from this accused man's gun and that it had passed through Mr. Stewart's head, then you could infer from that, if you accept all of that – you could infer that this accused man was armed with a .38 Smith and Wesson revolver.

Now, if you accept that, Madam Foreman and members of the jury, you look at the other two. Was there any .38 bullet recovered from anybody else? The answer if you accept the doctor and Sgt. Bent would be yes, there was such a bullet which was recovered from the head of Mr. Devon Hibbert. So you could say if

you accept all of that - you are entitled to say, Madam Foreman and members of the jury, that this accused man used violence or did injuries to Mr. Devon Hibbert, and if you so find then he would be guilty of capital murder also in relation to Mr. Devon Hibbert because you remember what I told you: he either caused the death or he inflicted injury or attempted to inflict injury and I am sure common sense will tell you that if he fires a bullet into a person's head that must be inflicting injury on that person. So if you find that he did, then he would be guilty of capital murder in relation to Mr. Hibbert.

Now, in relation to Mr. Fraser, the bullet that was recovered from his head was from a 9mm semi-automatic pistol. If you accept the evidence of Mr. Barnett this accused man only had one gun; he only saw him with one gun, therefore there is no evidence before us that he was armed with these two firearms. Therefore, bearing in mind, again, the evidence that they took two each, it would be open to you to infer that this other man, Chris, must have been the man who was armed with the 9mm pistol, and since the bullet that came from Mr. Fraser's head came from a 9mm semi-automatic pistol, then, if you accept all that, it would be open to you to conclude or infer that Mr. Fraser must have been shot by Chris. Now, if that is so, and there is no evidence that this accused man caused the death of Mr. Fraser, and since there was no evidence that he attempted to use violence on him, and since there is no evidence that he caused any injuries to Mr. Fraser, if you accept all of that then you will have to say, Madam Foreman and members of the jury, that he would not be guilty of capital murder in relation to Mr. Fraser. But bear in mind something I told you, earlier that in relation to common design you find he and Cris went there to kill these persons, then if Chris is the one who fired the shot which killed Mr. Fraser, if the common design was to kill then he would be

guilty of murder, not capital murder. That is if you find that all of this happened."

This is a case in which there was compelling evidence in support of the indictment. The jury had the benefit of a thorough, accurate and fair summing-up. We are quite satisfied that there is no reason for the intervention of this Court.

Accordingly, on May 20 we refused the application for leave to appeal.