JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 39 & 40/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA
vs.
ROWAN FRASER
AILEEN FRASER

Frank Phipps, Q.C. and Wentworth Charles
for Rowan Fraser

Dennis Daly, Q.C. and Rudolph Smellie
for Aileen Fraser

Glen Andrade, Q.C., Director of Public Prosecutions, and Bryan Sykes
for the Crown

November 8-12, 15-19, 22-26;
December 20, 1993 and July 29, 1994

RATTRAY, P.:

The appellants were charged along with Allison Fraser with the murder of Henry Aubrey Fraser consequent on the finding of a Coroner's jury in an Inquest held in June 1991. In a trial which lasted nineteen days the jury acquitted Allison Fraser and returned a verdict of guilty of murder against the appellants.

The deceased, generally known as Aubrey Fraser, was born in British Guyana, now Guyana, and had held high judicial positions in several Caribbean territories. On retirement from the Bench as a Judge of the Court of Appeal of Trinidad & Tobago, he came to live in Jamaica, where he assumed the post of Director of Legal Education in the Council of Legal Education which had the responsibility for the development of the Norman Manley Law School in Jamaica and the Hugh Wooding Law School in Trinidad & Tobago, a position from which he had also retired. His wife

Aileen is a Jamaican. At the relevant time Mr. Fraser was 67 years of age and Mrs. Aileen Fraser 69 years. They had been married for thirty-eight (38) years. On all accounts their relationship was excellent, and the family was a close and loving one. They had five children, all adults. On the relevant date two lived overseas and the others, Allison, Rowan and Stuart lived with their parents in the family home at 1 Sunset Avenue, Jack's Hill, St. Andrew.

On the 29th of November, 1988, Aileen Fraser was employed part-time at the Radio Unit at the University of the West Indies, assisting in the compilation of scripts and programmes. Aubrey Fraser had been commissioned to be Chairman of an Enquiry into an accident which had taken place at the Jamaica Flour Mills and was so engaged at the material time.

SEQUENCE OF EVENTS:

The evidence disclosed that on the 29th November, Aileen was brought home from work by her son Stuart. Her husband arrived after at about 6 p.m. Stuart who had been at home at various times during the day had prepared a meal of chicken soup for the family dinner. The day before had been his birthday. Aubrey Fraser sat down at the table in the kitchen to eat his meal just as Stuart was leaving, which on Stuart's evidence was a little after 7 p.m. Stuart left behind in the house his brother Rowan and his parents, Aubrey and Aileen Fraser. Stuart told the Court that his father had on a dressing gown when he left but was not dressed for bed. His mother was in the kitchen and Rowan was in the bath-room taking a shower. Just before he left Stuart saw Rowan going into his father's bedroom. A visitor, David Silvera, a friend of Stuart had been at the home with Stuart and his evidence supports this. They left together with the intention of celebrating Stuart's birthday over drinks along with another friend, Peter Daley, whom they intended to collect. Stuart and David went to Peter's house, and leaving there, they bought chips, and chasers for drinks. Having decided to have the celebration at Stuart's

house, they returned to Sunset Avenue at about 10 p.m. or shortly after along with Peter Daley. They were admitted into the house by Aileen Fraser. The three young men went to the verandah to have their celebratory drinks. Aileen Fraser was working in the kitchen at the dining table. At about 10.30 p.m. she came on to the verandah and said to Stuart in the presence of his two friends, that in Stuart's words:

> "...she just come from my father's room, had to look around the door and could see his head covered and she said that she is sure that he was trying a new form of yoga."

No one went to see this spectacle. Aubrey Fraser practised yoga from time to time.

Aileen came to the verandah to tell the young men good night some time between 12.30 a.m. to 1.00 a.m. About a minute or two after she had done so she returned to ask the visitors to leave. She appeared to Stuart to be disturbed. Stuart asked why? She said something which he did not hear.

Mr. Peter Daley who was present gave evidence that Mrs. Fraser told them that her husband was not very well and she was asking them to leave.

Stuart went to his father's room which was the master bedroom where both parents slept. In their bedroom there were two beds sharing a common headboard. The lights were on. His father was on the bed on which he usually slept. Stuart said, "Aubrey, what is wrong?" He got no response. As a result he felt his father's pulse and detected no beating. The fact was that Aubrey Fraser was dead.

NATURE OF INJURIES:

The post mortem examination performed by Dr. Ramesh Bhatt on the body of Aubrey Fraser revealed:

1. Seven superficial circular wounds, about 1/8 of an inch in diameter, in an area of one inch in diameter in the mid-clavicular line on the left side of the chest.

2. Two similar wounds, one inch lateral to these wounds.

with later. He would be prepared to describe Mrs. Fraser's condition when he saw her as being in deep shock. On a suggestion made to him that it was the telephone in the bedroom in which Aubrey Fraser was that was used, he was adamant that "the telephone where the body was, was not usable." This is in conflict with the evidence of other witnesses that it was the telephone wire in Allison's room which was cut and made that telephone unusable. The telephone in the master bedroom was usable and in fact used. Dependent upon the person who hit him, the force used, the weight of the instrument and the strength of the person hit, he admitted that it was possible that if Aubrey Fraser was so hit in the head and rendered unconscious, there would have been no signs of a struggle, and no defensive attitude. He described the head wound as severe but maintained that "the minute I saw foul play it was now in the hands of the police and the Government Forensic Medical Doctor. I came over as a friend to see a sick patient."

THE HOUSE AT 1 SUNSET AVENUE:

The Fraser's family home is a large two storey dwelling. At one end is a master bedroom occupied by Mr. & Mrs. Fraser. There are four windows in the corner of the room, two on the south and two on the north. The windows were described as "two part window frame 24' across and 4' high" with wooden slat jalousie type shutters on the outside. On the inside the windows are of glass and they slide vertically up and down. They are what are known as sash windows. There is one burglar bar to the top of each glass window, none to the bottom. The wooden shutters can be bolted. If the shutters are open and the glass windows pushed up, entry into the room is unobstructed. The uncontradicted evidence is that is how the Frasers slept, with the windows open. The master bedroom in which the parents slept has its own bathroom. A passage leads from that bedroom to the other end of the house. Along the passageway there is Allison's room, a bathroom, a room used by Stuart for sewing in his craft work, a drawing room, dining room and kitchen and beyond that two bedrooms

" to have it clarified. Yes, about sixteen hours, your post-mortem examination was sixteen hours after death?

A: After sixteen hours.

Q: That would take you back to about?

A: 9:30, about 9:30."

On further cross-examination Dr. Bhatt said:

"Q: That means from the condition that you saw, that death would have been between 9:00 and 10:00?

A: 9:00 and 10:00 with the stomach contents."

And then in re-examination by the Director of Public Prosecutions:

"Q: Doctor, could you explain for me? In answer to His Lordship you said as to the time of death would have occurred between 7:00 and 9:00. Do you still stick by that?

A: Yes, sir."

TIME OF DEATH - DR. MARTIN:

As soon as Dr. Martin suspected foul play he recognised it as a matter for the police. He carried out no detailed examination.

It is in this context that we have to examine his evidence as to the time of death of Aubrey Fraser. He gave an opinion as to the time of death as between 7:30 p.m. and 9:30 p.m. He based this opinion upon "rigor mortis - the stiffness of the neck". He admitted the limitations of this circumstance:

"My examination was purely clinical and in my opinion three to four hours was the time of death and I said there are other more accurate methods to determining death, the length of food in the stomach etc. . . ."

He saw the body at approximately 12:50 a.m. A calculation will show that on this evidence, the time of death would have been between 8:50 p.m. and 9:50 p.m. on the 29th November. His earlier evidence was that he was telephoned by Mrs. Fraser about 10 minutes to one in the morning, but it only took him two to three

minutes to get to the Fraser's home where he was met by the door by Stuart.

TIME OF DEATH - MRS. YVONNE CRUICKSHANK:

Mrs. Yvonne Cruickshank, the Government Analyst who arrived at 5:30 a.m. at the home made certain observations with which we will later deal.

However, as to the time of death she maintained that assuming that the deceased had a meal at 6:30 p.m. and there was found in the stomach undigested food and the post-mortem was done at 1:30 p.m. the following day, the meal, if a light meal, would be digested within two hours and if a heavy meal within three hours. The specific meal being put to her would be within three hours. In her opinion death would have occurred by 9:00 o'clock or before 9:00 o'clock. In answer to the Director of Public Prosecutions:

"Q: Between what time?

A: You said 6:30? 6:30 to 9:30 would have completed the digestion.

Q: So within what time death would have occurred?

A: Death had to occur before nine o'clock.

Q: Anytime before?

A: I cannot put a time because I didn't see the contents, whether it was partially ...

Q: Undigested?

A: Undigested can mean anything, sir.

Q: But you would put it up to what time?

A: Nine o'clock.

HIS LORDSHIP: So it would have to be anytime between when the meal was had and nine o'clock?

WITNESS : Yes, sir."

Mrs. Cruickshank's opinion was asked based upon certain assumptions. She was not present at the post-mortem examination by Dr. Bhatt. The meal described to her in her opinion would be totally digested within three hours of eating it. Given the completion of the meal at 6:30 p.m., death had to occur before 9:00 p.m. However when questioned by the Director of Public Prosecutions further her evidence was as follows:

"Q: Anytime before?

A: Yes sir."

The time given to her for Mr. Fraser completing his meal was 6:30 p.m. We have already commented on this with respect to Dr. Bhatt's evidence. Her opinion was given admittedly without having seen the stomach contents. She further admitted not seeing what he had eaten nor the physical condition of the eater, nor the quantity of food eaten. All these are elements required in order to give a firm opinion. Her expertise did not extend to pathology. She admitted also under cross-examination that the emptying time of the stomach varies from two to six hours. She accepted as correct a statement in a publication put to her - Scientific Evidence in Criminal Cases by Moenssens and Bumiban that:

> "Stomach contents may also be examined in determining time of death as well as cause of death. This is done on the basis that the stomach usually empties from four to six hours after the last meal."

MRS. CRUICKSHANK'S FURTHER OBSERVATIONS:

She related that:

> "In the bathroom, the shower of the bathroom, there was earth stained shoe prints. There was a white toilet tank cover which was found on the southern twin sized bed in the northern bedroom, and this could have come from the master bedroom; the toilet tank there was missing."

Her third statement was taken by Deputy Superintendent of Police Donald Brown on the 9th January, 1989. The statement narrates her finding whilst engaged in a search for a Telephone Company bill and emptying her deceased husband's briefcase a metal paper knife which fell out. She noticed a thick substance on the point. As she had reported the paper knife among the missing items from the home she telephoned Supt. Dwyer and informed him of the finding. She handed over the paper knife to Supt. Dwyer at her home.

Her final statement was taken on the 19th January, 1989 by Deputy Supt. Donald Brown. The narrative in this statement adds little to her other statements. Between the time Rowan left and Stuart and his friends returned as far as she was aware she was alone with Mr. Fraser in the house. She added in her own hand-writing having read over the statement as written by Deputy Supt. Brown: "I also handed over two letter openers and papers in the briefcase." This followed her statement that:

> "On Thursday 16th January 1989, 8:10 p.m. I handed over Mr. Fraser's briefcase to the Police at their request and gave this further statement which I read over and signed to its correctness".

There is a conflict on this point between Supt. Dwyer and Mrs. Fraser, as Supt. Dwyer maintains that it was on the 9th January that the two letter openers were handed over and not as Mrs. Fraser maintains on the 19th January.

ROWAN FRASER'S STATEMENTS

Rowan Fraser first gave a statement to the police taken down in writing on the 30th November, 1988. The statement has a narrative of his movements on the 29th November. He went jogging that afternoon, picked up his sister Allison at an address on Lords Road, and returned to 1 Sunset Avenue where he gave his sister the car. He saw his mother and father getting ready to have dinner. He showered in his bathroom and had his dinner in the television room. Shortly after his arrival at home he heard the dogs barking and being conscious of the security of the premises he checked the master

the windows open. The shutters would be opened and the glass windows were always up. The bottom half of these glass windows were not protected by burglar bars. Indeed when the body was found two windows in that bedroom were open. Entry could therefore be made into that room without a breaking-in. This fact nullifies any inference that because there was no evidence of a breaking-in the crime could not have been committed by an intruder. The evidence also established that the garage door was left unlocked sometimes and might have been on the night of the 29th. The keys are kept hanging beside the door. The back fence of the premises damaged by Hurricane Gilbert which had taken place a short time before the incident had not yet been repaired at the time of the murder. Stuart Fraser saw mud prints on the ledge of the wall beneath the window of the master bedroom.

The police photographer Irving Roye gave evidence that at the back of the house there is a ledge running along the wall. The ledge runs below the window of the master bedroom. An adult standing on the ground below the open window could go through the window into the master bedroom in which the body was found without using a ladder or anything else. The dogs were restless that night. Mud prints, or stud prints were found in the shower stall of the master bedroom.

As against this the police witnesses gave evidence that the ground outside beneath the windows appeared to be undisturbed. The prosecution also drew an inference from the evidence that the stud imprints appeared to be prints made by track shoes and the fact that Rowan was wearing track shoes suggested that Rowan was the person whose shoe prints were left in the shower stall. The alarm did not go off. We will return to examine these two last mentioned features later.

CONDUCT:

The prosecution made much of the fact that Mrs. Fraser although she must have known that her husband was dead called a Medical Doctor rather than the police. It must be recalled that Dr. Martin found her in "deep shock". Neither do we consider it reasonable to conclude

that her decision to call a doctor rather than the police unusual in the circumstances or in any way pointing to guilt on her part. All the police witnesses found herself and Rowan very co-operative during their investigations. There is nothing in the conduct of the appellants from which an inference adverse to them could be drawn.

In viewing circumstantial evidence it must be necessary to consider whether all the circumstances have been looked at and the evidence relating to these circumstances have been put before the Court. In this regard the conduct of the police investigation in terms of depth and effectiveness must come under scrutiny. Our reliance on this factor is not without precedent in our Court of Appeal. See observation of Kerr J.A. in George Edwards v. Regina, S.C.C.A. No. 32/83 unreported:

> "Secondly, we are not particularly at ease with the conduct of the investigations".

Although objects were dusted for fingerprints the Crown brought no evidence as to the result of the fingerprint investigation. Although the police witnesses said that in the shower stall in the master bedroom they saw shoe prints of studs of a track shoes no cast was made so as to be able to establish, as they were suggesting that Rowan wore track shoes that evening and therefore these track prints in the bath were from Rowan's shoes. Asst. Commissioner Wray saw only muddy marks in the shower stall, so did Stuart Fraser. Track shoes are common wear in Jamaica. The briefcase was taken by the police three months after the event. The toilet cover, the supposed murder weapon, was not taken by the police until mid June of 1991, just before the Coroner's Inquest. Mr. Fraser was killed in November, 1988. The cushion was not taken by the police. No tests were done on the toilet tank cover to find out if any residue of blood not visible to the naked eye existed. Neither was this done in relation to the bedroom area although there was some oblique suggestion that the blood could have been wiped up, and this would point to the involvement of family members.

The question of whether the alarm system was "button activated" as evidenced by Stuart Fraser or not was left in an unsatisfactory state. The prosecution maintains that the system must have been one activated by an electronic eye. The alarm system was never examined by the investigating police officers to establish whether as a fact it was activated by pushing a button as Stuart said or an electronically activated system. If such an examination had been done the evidence would not have been left resting upon inferences and consequently in such a state of speculation.

What then is the series of undesigned, unexpected coincidences that as a reasonable person a juror's judgment would be compelled to one conclusion that being, that the murder was committed by Aileen Fraser, Rowan Fraser or both? It could not be found in the presence of Aileen Fraser or Rowan Fraser or the presence of both of them in that house since they reside there, considering always that the evidence militates against Rowan's presence. It cannot be found in Aileen Fraser sending for the Medical Doctor rather than the police. It cannot be found in the co-operation which they both admittedly afforded the police in their investigations. It cannot be found in any statement made at any time by either of them.

The evidence of the position of the body is explained by the Crown's own medical evidence that if the blow to the head was administered first, the deceased would have become unconscious, would have been unable and indeed could not place himself in a defensive position and would have died in the position in which he was sleeping on the bed. That blow also, thus administered, would subsequently lessen the flow of blood thus explaining why there was no blood splashed on the walls. The absence of any cut in the fabric of the sweat suit is explained by the admission of the very Crown witnesses that had the neck of the sweat suit been pulled down or the bottom pulled up then the fabric would not have been damaged since the murder weapon would not have passed through the

sweat suit to inflict the injuries. This same pulling up and down as is admitted by the experts would create the same smudge on the inside of the upper part of the sweat suit which is being relied upon by the Crown to establish that the top of the sweat suit must have been put on after Mr. Fraser was killed.

The Crown's case is that the evidence lends itself to a joint enterprise. If as the evidence established, Rowan Fraser could not have been in that house at the time of his father's death, who is the other party to the joint enterprise with Aileen Fraser? For the Crown is not putting forward a proposition that Aileen Fraser, a woman of 69 years, could have by herself changed the garment being worn by Aubrey Fraser, six feet two tall and 235 to 250 lbs. in weight. Indeed the Crown's case is to the contrary. The theory therefore of change of garment after death does not survive the scrutiny of the evidence.

ACTING IN CONCERT:

In Reg. v. Merriman [1972] 3 W.L.R. 545, at p. 564 Lord Diplock states the proposition thus in terms of acting in concert where two or more defendants are charged in the same count of an indictment:

> "I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent".

If such is not established the conviction cannot be supported. In our view these "essential" ingredients were not established against either or both appellants.

The prosecution always has to prove by evidence, be it direct or circumstantial, firstly, that the crime was committed and secondly, that it was committed by the accused persons. It is this latter requirement which is completely absent in this particular case.

Lord Goddard C.J. stated the law as follows:

> "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. FINNEMORE, J., remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case".

R. v. Abbott [1955] 2 All E.R. 899 at page 901.

Such a direction was, in our view, absolutely necessary in this case and the learned trial judge failed to direct the jury in this regard. Indeed, it was the right of the appellants that, in those circumstances, the case should not have been left to the jury.

For all these reasons, we allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal in respect of both appellants.

Dr. Martin,(Jamaica Directory of Personalities, 3rd Edition 1990-1991),Registered Medical Practitioner with over 40 years experience, with admitted expertise in post-mortem examinations, a retired Government Medical Officer, Custos Rotulorum for the parish of Saint Andrew, a man of integrity and high esteem, spoke of the instructions he gave as he awaited the arrival of the police. When asked to identify which of the two occupants he addressed he said, "Either Stuart or Mrs. Fraser now, remember, I am also in shock, this is something that shocks me too."

The police arrived shortly after being summoned by Dr. Martin and investigations commenced by them were somewhat protracted, eventually the evidence was considered by a Coroner's Jury and consequent on the verdict of that jury Mrs. Aileen Fraser, widow, Rowan Fraser and Allison Fraser-Hunt, son and daughter of the deceased, were charged for the murder of Aubrey Fraser. On 26th March, 1992 after a trial which commenced on 2nd March, 1992 Mrs. Aileen Fraser and Rowan Fraser were convicted as charged. Allison Fraser-Hunt was acquitted. The applications of the convicted persons for leave to appeal were heard between 8th November 1993 and 26th November 1993 and on 20th December 1993 a majority decision was delivered allowing the appeal and entering verdicts of acquittal. Reasons for this decision were promised. This is the dissenting decision.

The Crown's case was based entirely on circumstantial evidence and the composite is extracted from the evidence of witnesses and from statements given by the appellants to the police mainly on the early morning of the 30th November 1988 soon after investigations into the circumstances of the crime commenced. The appellants at that time were not suspects; indeed the investigators' efforts were concentrated on the possibility of the crime having been committed by an intruder. This direction was encouraged by the fact of an open window in the master bedroom, a disabled telephone, and the purported (reported) loss of articles

location of the injuries and the size of the victim, was remarkably small.

Examination of the house revealed no sign of forcible entry, no evidence of breaking. . Dusting for finger prints uncovered prints that were not identified after the fingerprints of members of the family had been eliminated. The fingerprint of the victim, Dr. Fraser, were not taken hence no comparison for the purpose of elimination could be done. Policemen teemed the scene and the evidence showed that no attempt could be made to eliminate their prints, or the prints of other visitors.

In the bathtub of the master bathroom impressions resembling those that would be made by a track shoe were seen. These impressions were faint indeed and could not be preserved for their evidential value. Rowan wore track shoes on the evening and night of the 29th November 1988.

Detective Corporal Smith was the first police officer to enter the house on the morning of the 30th November, 1988. On his arrival in response to the summons he saw other policemen on the premises but none in the house. On entering the house he was directed by Mrs. Fraser to the master bedroom and as he entered the bedroom from the passage a burglar alarm was activated. On his evidence supported by a statement from Mrs. Fraser, Stuart Fraser deactivated the alarm. This he did by approaching the southern window in the master bedroom from without reaching in through the open window and manipulating the switch which was on the wall by this window. This burglar alarm, part of the security system of the house was controlled by three switches. One as shown above in the master bedroom, one in the kitchen and the other in the living room. Other aspects of the security system in place were burglar bars at the upper section of the sash windows and five dogs; 3 Labradors, 1 Alsatian and a Mongrel named "Princess", eave lights, and the alertness of the occupants as evidenced by Rowan's

account of his response to the barking of the dogs. The dogs were described by Dr. Martin as vicious and he declared he would not enter the premises unescorted. Peter Daley, a friend of Stewart and a frequent visitor to the house was afraid of the dogs, he also required an escort to enter the home. Mr. Ephraim Adams, Dr. Fraser's chauffeur for 14 years was a person who frequented the home, he was guarded in his approach to the dogs having been bitten twice in the home by the mongrel, "Princess".

In the questions and answers Mrs. Fraser was asked and responded thus:

"Question 3. Is there an alarm system at the house?

Answer: There is an alarm system, I don't know if the neighbour would hear it because they live in air condition locked-up rooms. The alarm is against the wall and is button activated, if one pass near the wall where it is located it would be set off. The alarm is by the window facing the sea near to the door near to Mr. Fraser's bed. This is one of the things that puzzles me, how the person could pass by and not activate it.

Question 4. Was the alarm system working on the 29th of November, 1988?

Answer: Yes, because one of the police-men who had come there the night actually set it off."

Cpl. Smith said that before the police photographer arrived, he spoke to Allison Fraser. She asked him how long the body would remain in the bedroom and he told her until the police photographer and the undertakers arrived. She said she had already taken photographs of the body. He saw her with a camera.

Mr. Hugh Cholmondeley at approximately 12.45 a.m. on 30th November 1988, received a telephone call from Mrs. Fraser she told him that Aubrey was **not** well, his hands were cold and

"The appellant and R.W. were indicted together on separate charges of the forgery of a receipt for money. At the close of the case for the prosecution counsel for the appellant submitted that there was no evidence against the appellant to go to the jury. The trial judge overruled this submission. R.W. then gave evidence which was hostile to the appellant, the appellant himself also gave evidence, and the jury convicted both the appellant and R.W. In fact there had been no case for the appellant to answer. On the question whether the Court of Criminal Appeal were bound to quash the conviction of the appellant or were entitled in deciding whether to quash the conviction to have regard to the whole of the evidence including that of R.W. and of the appellant,
Held: where two persons are joined in one indictment and charged on separate counts with the same **offence** and there is no evidence against one accused that he committed the offence either alone or in concert with the other, then on the accused's submitting that there is no case against him to go to the jury, it is right that his case should not be left to the jury; accordingly the conviction of the appellant would be quashed.
Judgment of Channell, J in R v Cohen & Bateman (1909) (73 J.P. at p. 352) applied.
R. v. Power [1919] 1 K B 572) considered and distinguished.
Per Curiam; if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert, both ought to be acquitted (see p. 901, letter F post)
Appeal allowed.

In **Collins & Fox** (supra) the dicta of Lord Goddard C J in **Abbott's** case was applied. In **R. v. Lane & Lane** the court following and applying **Abbott's** case held:

Analysis re Time of Death

The prosecution had to establish the time of death and in this regard they relied on the evidence of the experts Dr. Martin, Mrs. Cruickshank and the pathologist Dr. Bhatt. Dr. Martin's opinion as to the time of death between 7.00 p.m. and 9.00 p.m. to 9:30 p.m. was based on the stage of rigor mortis he observed when he saw the body at about 1.00 a.m. He said that a view of the stomach and its contents would have assisted him in giving an accurate opinion. Mrs. Cruickshank's opinion was that death occurred between 7.00 p.m. and 9.00 p.m. definitely before 9.00 p.m. on 29th November, 1988. This opinion was based on information she had, that the deceased had eaten at 6.30 p.m. and that the stomach when examined had partially digested food and was full. Being trained in forensic science and in Biochemistry and digestion being in part a biochemical process, had she seen the stomach contents she would have been able to be more precise as to the time of death. Dr. Bhatt was the only expert who saw the stomach and its contents. His evidence was that the stomach was full and its contents partially digested. Some contents were identifiable in their original form as ingested.

Dr. Bhatt's evidence was that the stomach in the process of digestion and assimilation emptied its contents in 4-6 hours. Emptying of its contents commences ½ to 1 hour after ingestion of the meal and the process of emptying is completed in 4-6 hours depending on the nature of the diet.

Mrs. Cruickshank agreed that the authority of Taylor's Medical Jurisprudence, 1973 edition, gave the time of emptying of the stomach as 4-6 hours. But her recent readings and authorities of recent origin showed that studies had revealed that emptying had occurred 2-6 hours after a meal. She relied on Polsons Essentials of Forensic Medicine 4th edition 1985.

> "good relationship, inter-relationship, and therefore there is no reason why they would have wanted to kill the deceased."

The jury heard the statement made by the appellant Aileen Fraser and the evidence of the appellant Rowan Fraser and the explanation he gave for the statement he made in relation to the garment, pyjamas, his father wore. They saw and heard him and their exclusive function was to determine what they made of what was said by both appellants. The grounds of appeal fail.

Mr. Daly Q C in ground II said:

> "The learned trial judge erred in telling the jury that circumstantial evidence was free from the blemishes that affect direct evidence."

The accuracy of this complaint must be ascertained by comparing it with the context in which the directions were given beginning at page 1172 and continuing on page 1173 and 1174 the learned judge said:

> "Circumstantial evidence is as valuable in prove (sic) of a charge as is direct or eyewitness evidence. Circumstantial evidence going to prove the guilt of an accused is this, one witness must prove one thing another proves another thing, and these taken together prove the charge to the extent where you can feel sure of it. But none of them taken separately proves the guilt of the accused. Taken together they lead to one inevitable conclusion of guilt, and if that is the result of circumstantial evidence it is as much, it is a much safer conclusion to come to than if one witness goes into the witness box and gives direct evidence and says I saw the crime committed. An eyewitness may sometimes be mistaken, mistaken about a person, or about an act, or may be influenced by grudge or spite. <u>Circumstantial evidence is free from these blemishes. Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find such a series of undesigned,</u>

They were not confused and as the directions satisfied the clear dicta of this court given in **R v Yvonne Johns & Frederick McIntosh** (supra) I hold that this court should not interfere with the convictions. I therefore treat the applications as the hearing of the appeals, dismiss the appeals against convictions. Following on the dictates of the Offences against the Person (Amendment) Act 1992 I classify the convictions as non-capital murder; the sentences of death are set aside, sentences of imprisonment for life substituted and I direct that they be not considered for parole until they shall have served a sentence of fifteen years.

Counsel at the Bar have shown industry and erudition in the preparation and presentation of their submissions. My failure to refer to all the authorities they cited has been determined by a desire to avoid prolixity and not out of disrespect.