JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 104 AND 105 of 1993

BEFORE: THE HON. MR. JUSTICE RATTRAY - PRESIDENT
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

IRVING COX

AND

FLOYD HOWELL

V.

REGINAM

Dennis Daly, Q.C., and Walter Scott for Applicant Cox

Robin Smith for Applicant Howell

Miss Carolyn Reid and Mrs. Valrie Stephens for the Crown

October 30, 31; November 1, 2, 3, 6, 7, 8, 9; and December 20, 1995

RATTRAY P:

On the 27th October 1993 Irving Cox and Floyd Howell were convicted in the Home Circuit Court on seven counts of capital murder and from this conviction they have applied for leave to appeal. The trial before Harrison J. and a jury lasted several days and involved detailed cross-examination of witnesses and submissions by Counsel.

The venue of the murders for which the applicants were charged was Seaview Gardens in the parish of St. Andrew.

On the night of Saturday the 24th February 1990 there was a set up or wake or nine-night being kept on premises lot 1623 Seaview Gardens for a deceased person, Howard Dennis who had been gunned down a few days before in that community. Present were about fifty persons in the house, in the pathway or lane and on the premises. They were engaged in the normal activities attendant on such an event, singing, playing dominoes and other games, eating and drinking. The area was lit by a street light and an electric light connected to the outside of the house.

At about 1:30 a.m. to 2:00 a.m. on the 25th February, a group of about seven men, dressed in black and some armed with guns, invaded the area, causing the assembled persons to scatter in panic. Some of them ran into the dwelling house occupied by the Dennis family. Suffice it to say, the gunmen entered the house and executed by shooting seven men who had sought refuge there.

The narrative of the events which took place on that gruesome early morning is recorded in the testimony of the three eye-witnesses who escaped the slaughter in the Dennis home - Lascelles Dennis, Jnr., called 'Little Demus', a brother of the deceased man for whom the wake was being held, his father Lascelles Dennis, Snr., and one Howard Johnson. The crux of the determination as to whether the convictions should stand is to be found in the identification evidence with regard to the presence and participation of the two applicants. Supporting this is the evidence of the police witnesses who

investigated the murders. The defence was a denial by the applicants of their presence and participation put forward in the case of Irving Cox by means of an unsworn statement and in the case of Floyd Howell from the witness box by way of an alibi supported by a witness, his aunt, one Velmore Tomlinson.

On behalf of the applicant Irving Cox, Mr. Dennis Daly, Q.C. supported by Mr. Walter Scott of Counsel made the quality of the identification evidence the main thrust of their attack on the validity of the conviction and its ability to withstand the scrutiny of appellate review.

The motive for the massacre was either to silence witnesses or as a reprisal against the giving of statements in the previous murder of Howard Dennis. The witnesses as to identification claimed to recognise the two applicants as persons whom they had known prior to the incident.

The gunmen had come running or walking fast off the main around a corner of the narrow lane or pathway on which the Dennis' home was situated. Their appearance caused sudden panic and a frantic effort on the part of those gathered there including the witnesses to escape to safety. As they ran they shouted 'gunman, gunman'.

The quality of the identification evidence given by the three eye-witnesses was crucial to a determination as to the guilt of the applicants. With respect to the applicant Irving Cox, the witness Lascelles Dennis, Jnr., 19 years of age at the time of the murders, testified to having seen him on at least three occasions before in the

Seaview community and at Machado on East Queen Street near the Palace Theatre. The last time he had seen him was about a month before. He was told that his name was 'Short Piece' and he knew him by that name on the night of the killing. He recognised among the men who came around the corner both applicants, Floyd Howell and Irving Cox whom he knew as 'Short Piece'. He also recognised 'Eddie Bap', Peter and 'Natty'. He ran inside his house and into his back bedroom shouting "gunman!" Everybody was running. In the back bedroom were several persons including his brother Christopher Gore, who was asleep in bed. The gunmen began banging at the front door calling out 'police, police'. He heard 'Eddie Bap' whose voice he recognised asking for 'Demus', the name by which he is called. He hid in the bedroom behind a barrel and a hanging shelf. He then heard 'Eddie Bap' tell everybody to lie down and after that 'Eddie Bap' said "kill everybody." The witness then heard gun shots. Christopher had awakened and had gone outside. He had heard the gunmen talking and Eddie "like him a say him come fi kill off the whole a mi family because dem a call up him name." After some time he ventured out and found seven dead men, four in the dining room, two in the living room, and one in another bedroom. He had witnessed his brother Howard shot down a few days before and had given the names of 'Eddie Bap' and Peter to the police in connection with that murder.

The very morning of the killing of the seven men he gave a statement to Superintendent Donald Brown. It is important to note that in the statement given to Superintendent Brown he never called

the name 'Short Piece' at all. The names he called as the persons he identified were Peter, 'Eddie Bap' 'Natty' and Floyd. He gave descriptions of three other men. A remarkable feature of the applicant Cox is that his face on the left side has a large scar running down from the hair line at the forehead to below the left ear. No such description appears amongst those given by the witness to Superintendent Brown. He further stated that all the men except for 'Natty' who lives in Riverton, live in Seaview Gardens. The applicant Cox never lived in Seaview Gardens.

The witness Howard Johnson was playing ludo at the wake when he saw seven men with guns rush around the corner in the lane. He knew five of them - 'Shorty Piece', 'Fly' (Howell), Natty Morgan, 'Eddie Bap' and Peter.

The transcript reveals the following:

"**HIS LORDSHIP**:	What parts of their body you could recognise?
A:	Them in bare black so I couldn't recognise them body so good.
Q:	So how you know is Fly and Shorty Piece?
A:	Because I know them by their voice."

He ran into the bedroom, some of the gunmen entered the house through the front and some through the back. 'Shorty Piece' went through the front. He heard 'Eddie Bap' say: "Kill off everybody," and gun shots followed. Himself and others went through the bathroom

top and into another house. He knew 'Shorty Piece' from South (Maiden Lane) but had never spoken to him before. The first time he spoke to him was at Central Police lock-up on the 16th of August, 1990. 'Shorty Piece' and himself were in the cell alone at the Police Station and he pointed out 'Shorty Piece' to the police, Inspector Ivanhoe Thompson saying: "Is him that, Mr. Thompson." 'Shorty Piece' laughed and said: "Do anything what you want to do." He had seen 'Shorty Piece' at South about a month before. He knew Floyd because they lived in the same community near to each other.

In a statement given by him to the police on the morning of the killings he mentions the names of 'Eddie Bap', Peter, 'Natty' and Floyd, as among the seven gunmen he saw. He does not mention 'Short Piece'. The other men he stated "are young men, between fifteen years and sixteen years old. They all live in Seaview Gardens." The applicant Cox does not live in Seaview Gardens and does not fit any of the descriptions given.

The other witness as to identification was Lascelles Dennis Snr. the father of Lascelles Dennis Jnr., and of Howard Dennis, for whom the wake was being kept, and the step-father of Christopher Rose who was killed in the massacre. He was sitting in his living room with three friends on the fatal early morning. He heard strong running outside and shouts of 'gunman!" People stampeded through his house. The living room glass was smashed and the applicant Howell came in with a long gun. He had known Howell for several years. Howell ordered all of them to lie down and said: "All of you going die tonight." The others lay down but he went and stooped behind the

settee. Howell held the gun to the heads of three men, Merrick, Lee Monteith and Jackson, and he heard three explosions. He heard gun shots also in other rooms. He heard them searching next door for 'Demus' and three men passed the doorway, 'Short Piece', 'Eddie Bap' and Howell. When asked: "Who you call 'Short Piece'?" He answered: "Cox."

He had seen 'Short Piece' in Seaview quite a number of times. 'Eddie Bap' and Floyd had guns, but not 'Short Piece'. 'Short Piece' and 'Eddie Bap' went through the dining room and Howell went through the glass door. However, before he went 'Eddie Bap' pushed in his head and asked Howell if everybody in there was dead and Floyd Howell said yes. 'Eddie Bap' questioned about the condition of one of the men who was dressed in green and Floyd fired another shot in the room. Mr. Dennis Snr. had identified the applicant in the dock as Cox. In cross-examination the following emerged:

"**Q:** This time you spoke of 'Shortpiece' and said his name was Cox. Did you say that?

A: Yes.

Q: So I ask you, when did you discover his name was Cox?

A: That Cox just get mix upon now.

Q: Did you say that Cox just get mix up somewhere?

A: With some name which ...

Q: With some name which what, sir? Finish the sentence.

A: Some other names. To be frank it just appear; it just come.

" **Q:** Who?

A: With some friends.

Q: What are you taking about? Who just appear?

A: Where me get that name.

Q: Where you get that name from? That's what I want to know.

A: That name arrive same place down by Seaview area.

Q: That name arrive same place?

HIS LORDSHIP: Mr. Witter, don't repeat the answers.

Q: When did that name arrive down at Seaview as far as you know?

A: In that same incident time.

Q: In that same incident time?

A: Yes.

Q: Meaning what? When the shooting was going on, when the shooting was over, just before the shooting? When, sir, did the name 'Cox' arrive at Sea-view Gardens.

A: It was before the shooting.

Q: What?

A: It was before.

Q: The name arrive before the shooting. How long before the shooting did the name arrive?

A: Maybe a month or two before."

He was not able to explain how he attached the name Cox to the man he knew as 'Short Piece' from the first time he saw him about a month or two before the incident.

Later he was asked:

"**Q:** You told this court this morning about a 'Short Piece', otherwise Cox, yes? That is what we have. When did you find out, if at all, that his name was Cox?

A: I mixed up, apparently with somebody else.

Q: Stop there, please.

A: But I know him is 'Short Piece'.

Q: Whose name is it with which you mixed up his name? This somebody else, who is that person?

A: Somebody who live in Seaview.

Q: Who is the person, Mr. Dennis?

A: That person lives down there in Seaview.

Q: Who is the person?

A: Like male or female? It's a male.

Q: What is the name of the male?

A: Just by Cox, I know him.

Q: There is a person name Cox, whose name you are mixing up with him, is that so?

A: Yes.

Q: That is the name. If you are mixing up the name you are mixing up the face too.

" **A:** No, sir. No."

He said he knew of the distinctive scar on the face of the man name 'Short Piece'. He had given a statement to Senior Superintendent Hibbert. He had told Mr. Hibbert that one of the men was known to him as 'Short Piece". However under cross-examination the following emerged:

"Q: Well, I want you to be sure. You see we are going to have to read the statement. Will you frankly admit that you never did at all call the name 'Short Piece' in your statement?

A: I never mentioned the name.

Q: No other name Cox, did you?

A: No.

Q: Nor did you describe anyone whose face, cut-up, cut-up and in particular had a long prominent scar on the side of his face running or arching backward to the ear?

A: No."

Senior Superintendent Hibbert was able to confirm that the witness had never mentioned the name 'Short Piece' or Cox to him in giving a statement.

What was left then in respect of the identification of the applicant Cox was the evidence of what was referred to as an "informal" identification parade carried out by the police in respect of the applicant on the 16th of August 1991.

The evidence of Sergeant Payne was that the applicant Cox had told him that he would not be going on any identification parade because he was well-known. Consequently, he arranged an "informal" identification parade later that day with the applicant and at least seven other prisoners of almost similar height and appearance in the holding area of the Central Police Station lockups. There were two Justices of the Peace present. The witness Howard Johnson was sent on the parade. The following examination-in-chief of Sergeant Payne by Counsel for the Crown followed:

"**Q:** And did you say anything to Howard Johnson in the presence and hearing of Irving Cox?

A: Yes, ma'am.

Q: What did you say?

A: I asked him if he knew what he was there for.

Q: What did he say?

A: He replied in the affirmative.

Q: And thereafter did he do anything, Howard Johnson?

A: Yes, ma'am.

Q: What did he do?

A: He pointed out the accused Cox , ma'am.

Q: And when he pointed out the accused Cox, did he say anything that you can recall? Either you can recall or you can't?

A: I don't really recall.

Q: Did Irving Cox say anything when he was pointed out by Mr. Howard Johnson?

" **A:** I don't recall if he made any statement?"

Although Sergeant Payne had made a careful record in notes of what took place at the parade the notes had been misplaced. His written statements as to the holding of the parade dated 18th April 1991, which he said was a genuine mistake.

The evidence of Howard Johnson is of having pointed out the applicant Cox at Central Police Station in the hearing of the applicant "because mi and him right at the cell." The witness had used the words: "Is him that Mr. Thompson" to the investigating officer. Although Sergeant Payne denied that the applicant had told him that he would not go on the parade because his photograph had been published in the Record newspaper in connection with the murder, the fact of the publication was indeed later admitted by Sergeant Payne. It had appeared on the 2nd of May, 1990, in the Record newspaper before the identification parade was conducted.

Lascelles Dennis gave evidence of having identified on the 16th of August 1990 the applicant Cox at the Central Police Station. The following cross-examination is revealing:

"**Q:** When you saw Mr. Cox in that line with four or five others, do you know where Mr. Howard Johnson was?

A: He was right there.

Q: Right there beside you?

A: Actually yes, sir.

Q: So when you are standing on your side of the barriers or bars looking

" through the line at the five or six, there was nothing to stop Howard Johnson to see in the line of five or six, was there?

A: No, sir."

Inspector Ivanhoe Thompson the officer in charge of the case said he was at the Central Police Station on the day of the "informal" identification parade but he had nothing to do with it, although he did see Lascelles Dennis and Howard Johnson at the Station. He received no statements from the Justices of the Peace who witnessed the parade. Indeed these Justices of the Peace were never called to give evidence at the trial.

It is clear that the circumstances under which the "informal" identification parade was held were far from satisfactory and its probity in great doubt. The conflict in the evidence between Inspector Thompson and the two civilian witnesses, Howard Johnson and Lascelles Dennis Jnr., as to Inspector Thompson's presence on the parade, the witness having said that he did transport them to the parade, the evidence of Howard Johnson that he was in the cell with the applicant Cox and told Inspector Thompson: "Is him that Mr. Thompson", the conflict between Sergeant Payne and Howard Johnson as to how the parade was held all attest to the unsatisfactory nature of the identification.

THE LAW

Mr. Dennis Daly, Q.C. submitted that the learned trial judge erred in law in allowing the case to go to the jury. Indeed there had

been a lengthy no-case submission made on behalf of the applicant at the trial. Mr. Daly relied on the well-known authorities on identification evidence in ***R. v. Turnbull*** [1976] 3 All E.R. 549; ***R. v. Galbraith*** [1981] 2 All E.R., to support his proposition that in the state of the evidence the trial judge should have withdrawn the case from the jury. The road is too well trodden now for me to go into a detailed assessment of all the cases, several of which emanated from our jurisdiction. As Mr. Daly, Q.C. pointed out the apparent conflict between ***Turnbull and Galbraith*** was analysed and determined in ***Daley v. The Queen*** [1993] 4 All E.R. at p. 86 an appeal to the Judicial Committee of the Privy Council from this jurisdiction. Lord Widgery had stated in ***Turnbull*** at p. 91:

> "If the quality of the evidence is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good ... the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution ... When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. 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."

Lord Lane C.J. had stated in ***Galbraith,*** page 92:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

Lord Mustill in Daley explains and rationalises the apparent conflict between ***Turnbull and Galbraith*** as follows at pp. 93-94:

> "It is however desirable to say something about the manner in which the principles of ***R v Turnbull*** and ***R v Galbraith*** are able to live together. That they must be able to do so, and that there has not taken place an accidental conflict of authority, is clear from their history. As has been seen, Lord Widgery CJ delivered the judgment in ***R v Turnbull*** only eight months after he had so bluntly stated in ***R v Barker*** that it was not the job of the trial judge to decide questions of credibility. His Lordship could not have intended what he said in ***R v Turnbull*** to encroach upon the general principle, and the absence in argument and in the judgment itself of any reference to

"***R v Barker*** or to Practice Note [1962] 1 All ER 448, [1962] 1 WLR 227 shows that it never occurred to anyone concerned that something of this kind was taking place. Conversely, the judgment in ***R v Galbraith*** was delivered at a time when the appellate courts were occupied in making sure that the principles of ***R v Turnbull*** were being properly observed in the courts. Indeed, fewer than twelve months previously, Lord Lane CJ had himself delivered the judgment of a court of five judges in ***R v Weeder*** [1980] 71 Cr App R 228, reiterating the duty of the judge to withdraw the case from the jury when the quality of evidence is poor. Although ***R v Turnbull*** was not referred to in ***R v Galbraith*** it is inconceivable that the court can have overlooked the parallel line of authority.

It is therefore plain that no incongruity between the two principles was perceived at the outset, and (with the exception of one unreported decision and a few isolated comments in academic writings) none has been perceived ever since. How then are the principles able to coexist? There appear to be two possibilities. The first is simply that the ***Turnbull*** rule is an exception super-imposed on the general principles of ***R v Galbraith,*** taking identification cases (or, more accurately, the kind of identification case which was the subject of ***R v Turnbull*** - for ***R v Galbraith*** was itself concerned with identification) outside the general principle, whilst otherwise leaving it completely intact. This is certainly a possible view. The division of responsibility between judge and jury is of great importance and is staunchly maintained because it serves the interests of justice. But it is no more adamantine than any other procedural rule serving the same ends, and must admit of exceptions if those interests so demand. An obvious exception is the long standing duty of the judge now embodied in s 76(2) of the Police and Criminal Evidence Act 1984, to rule on whether a confession by the accused has been, or may have been, obtained by oppression, or in

"consequence of anything said or done which was likely to render it unreliable. This is an issue of fact, and yet it is reserved for the judge because of a perceived risk that the jury may act upon evidence which is not to be relied upon. No doubt there are other examples elsewhere in the law of criminal procedure. Similarly the rationale of the ***Turnbull*** principle is the need to eliminate the 'ghastly risk' (as Lord Widgery CJ called it in ***R v Oakwell*** [1978] 1 All ER 1223 at 1227, [1978] 1 WLR 32 at 36-37) run in certain types of identification case. This risk may well be seen as serious enough to outweigh the general principle that the functions of the judge and jury must be kept apart.

Their Lordships doubt, however, whether it is necessary to explain the two lines of authority in this way. A reading of the judgment in ***R v Galbraith*** as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by ***R v Turnbull*** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as ***R v Turnbull*** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the ***Turnbull*** doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them."

In respect of the applicant Cox the quality of the identification evidence was indeed poor. The terrifying and distressing circumstances under which he was claimed to have been identified on the night of the murder, the failure of the witness to call the name 'Short Piece' to the police or to give a description which could be said to fit him, the fragility, indeed apparent irregularity of the "informal" identification parade, unbuttressed as the evidence was by other probative evidence places it squarely within that definition. Consequently, the application for leave to appeal by the applicant Irving Cox is treated as the hearing of the appeal which is hereby allowed, the conviction quashed, and sentence set aside and a verdict of acquittal entered.

RE: FLOYD HOWELL

The applicant Howell unlike Cox lived in the Seaview Gardens community and was well-known to the witnesses over the years. He was identified by the witness Lascelles Dennis Jnr. as being one of the men who "rushed" around the corner that night and his evidence was that the applicant Howell was armed with a long gun. He admitted however, that at the preliminary enquiry at the Gun Court he had not mentioned the applicant Howell's name. He said that was because he was nervous. The witness Howard Johnson testified that the applicant Howell was one of the gunmen who came around the corner of the lane in that early morning. He knew the applicant from 1983. They had seen each other quite often. They

lived in the same community and they had spoken to each other. He had seen the applicant enter the house that night or that early morning through the back door. He said that the men's faces were not covered.

Lascelles Dennis Snr. whilst sitting on his settee in his drawing room with three friends heard the glass of his window smashed and "I see Howell come inside with a long gun." He knew him from five to six years before and his relatives as well. Howell ordered all of them to lie down on their faces and said: "All of you going die tonight." The witness stooped behind the settee and heard "bow, bow, bow". He saw Howell hold the gun to the heads of the men. He heard beds being turned over in the room next door and afterwards saw 'Short Piece' 'Eddie Bap' and Howell pass the door. 'Eddie Bap' pushed his head through the glass and asked Floyd if everybody in there is dead and Floyd said yes. 'Eddie Bap' said: "That one in green how him look so, touch him again" and Floyd fired another shot in the room. It was established in cross-examination that when he gave his statement he had never mentioned the applicant's name to Superintendent Hibbert.

Assistant Commissioner Isadore Hibbert took a cautioned statement from the applicant which was properly admitted in evidence by the trial judge. The statement reads as follows:

> "We go a Riverton and me hear them say them a go a the dance over Seaview Garden. This time me was together with Natty, Sam, Eddie Bap, Patrick, Rohan, Oniel and Shorty 'P'. Me, Eddie Bap, Sam, Oniel and Shorty 'P' leave fi go a the dance. We go over the dance and when we a leave

> "fi go back in Riverton, that time we in Seaview still, we buck up on the nine night. Me hear them say them a go rob the people them in a the nine night. Sam did have the M-16 gun and Eddie Bap have the Mack Eleven. We rush down on the people them and tell everybody to go in a the house. Me and Oniel stay outside and Eddie Bap, Shorty 'P' and Sam go inside. When me hear the first shot me go in the house and see everybody lying on the ground. Me make out a big man name Ken on the ground and some other people. Me don't know them name still but me know them face.
>
> Me go back outside and me hear some more shot a fire. Then shortly after Eddie Bap, Sam and Shorty 'P' come outside and say them ready now and we walk back to Riverton City. Me see Natty, Rohan, Patrick and all of we decide fi go back pon the hills and we go back up there the same night. All of we stay up there until the Tuesday we come down and we decide fi split up.
>
> Well, me go all bout until me go a Cockburn Pen and the police come there come pick me up with my girlfriend, Majorie Robinson, on Tuesday, election day, and me tell the police say me name Paul Wright.
>
> Me don't have anything else fi say, officer."

This statement firmly places the applicant on the scene and his participation in the events of that night. It was of course not evidence in respect of the applicant Cox and indeed in the interest of fairness and justice an application made by Counsel for Cox to edit the statement to omit any references to 'Shorty P' should have been granted, especially as Counsel for the accused Howell had stated that he had no objection to the editing of the statement in the terms of the application by Counsel for Cox. The prejudicial effect despite

the superficial difference between the name 'Shorty P' in the statement and 'Short Piece' must have been great and the evidential value of the statement against the applicant Cox was non-existent.

Mr. Witter, Counsel for the applicant Cox had made a comprehensive no-case submission on behalf of Cox which was in the presence of the jury. Mr. Robin Smith, Counsel for the applicant Howell was content to adopt the submissions of Mr. Witter so far it applied to his client in respect of counts 1, 3 and 6. It was urged before us that the no-case submission in the presence of the jury was an irregularity which was sufficient to require the applicant Howell's appeal to be allowed. It was indeed an irregularity as is established in cases like ***Lobban v. R.*** [1995] 2 All E.R. p. 611; ***Rupert Crosdale v. R.*** (unreported), Privy Council Appeal No. 13 of 1994; ***Nigel Neil v. R.*** (unreported), Privy Council Appeal No. 22 of 1994. But as was stated by Lord Mustill in the last cited case (p. 3 of the judgment):

> "This is not to say that in every instance where the jury has remained in court, whilst a submission of this kind has been made and rejected, an appeal on this ground will be allowed. Far from it. The appellate court may well conclude, after examining a transcript of what passed between the judge and counsel, that there was no harm serious enough to imperil the fairness of the verdict."

Mr. Robin Smith, Counsel for Howell made a brief no-case submission in respect to his client specifically confined to counts 1, 3 and 6 and merely adopting Mr. Witter's no-case submission in

respect of Cox relative to these three counts. The deceased in relation to these counts were Stokely Merrick, Leaford Monteith and Kensil Lewis. No formal evidence of identification had been led by the Crown in respect of these three deceased persons. The judge's comments when ruling on the no-case submission were inter alia as follows:

> "Count 1, the evidence was that Howell held the gun to the back of the head and he heard 'Bow!' It is true there was no formal identification as led by the prosecution as to who went to the identification parade. Count 3, Lascelles Dennis said he identified Leaford Monteith. He said so, and count 6, Mr. Dennis Snr. said he saw him dead in the dining-room. I don't agree."

Did this comment imperil the fairness of the trial with respect to Howell? The narrow ambit of the submission on behalf of the applicant Howell applied not to the facts of the case in relation to who committed the offence but only in respect of the absence of a formal identification of the three deceased men. The specific reference by the trial judge in refusing the no-case submission as to the evidence of what Howell is alleged to have done may have led the jury to believe that the trial judge was accepting the truth of this piece of evidence.

The defence of the applicant Howell given by his evidence from the witness box was that he was beaten on the bottom of his feet and on his buttocks with a pick-axe stick by the police, punched in his face and threatened by the police who told him that: "I am a wanted man and if I do not tell them what took place they would carry me on

a lonely road and kill me." At the time he was alleged to have been involved in the murder he said he was at his aunt's home in Kitson Town, St. Catherine. His aunt Velmore Tomlinson gave evidence to support his presence living at her home between the 12th of February and the 4th of March 1990.

It is clear from the verdict that this alibi was rejected by the jury as they were entitled to do. Furthermore, although in respect of Cox the trial judge in his summing-up told the jury that his rejection of the no-case submission must not be interpreted to mean that he considered Cox to be guilty, he gave no similar direction at all with respect to the applicant Howell. In our view the combination of the judge's comment with regard to Howell, and his failure in the summing-up to give the necessary direction with respect to him created the danger that the jury may have been influenced into believing that the judge in ruling that there was a case to answer was indicating that the applicant Howell was in his view guilty of the counts to which Mr. Robin Smith had confined his no-case submission. This is the very mischief, the risk of potential prejudice which the judgments anticipated and explored in cases like ***Rupert Crosdale v. The Queen***, (supra); ***Lobban v. The Queen***, (supra); and ***Nigel Neil v. The Queen***, (supra). In the latter case Lord Mustill stated:

> "The appellate court may well conclude, after examining a transcript of what passed between the judge and counsel, that there was no harm serious enough to imperil the fairness of the verdict. But some cases may be in a different category, ..."

In our view in respect to Howell this case falls in a different category and could lead to a risk of injustice. This does not of course affect the other four counts of capital murder which were not the subject of the no-case submission.

The circumstances of the murder fell squarely within the definition of terrorism in the Offences against the Person Act, and as such would attract the rubric of capital murder. In the result therefore we treated the application by Floyd Howell as the appeal and we allowed the appeal in respect of counts 1, 3 and 6 and the conviction is quashed in respect of those counts for the reasons stated. However in relation to counts 2, 4, 5 and 7 the appeals are dismissed.