[2013] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 16 and 17/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

CALVIN POWELL
LENNOX SWABY v R

Dr Randolph Williams for the appellant Calvin Powell

Ms Elham Bogle for the appellant Lennox Swaby

Miss Claudette Thompson and Gregg Walcolm for the Crown

21, 22, 24 January and 5 July 2013

BROOKS JA

[1] Manchester residents, Mr Richard Lyn and his wife Julia, were last seen alive at a funeral service on Saturday, 9 December 2006 at about 4:30 pm. On the following morning, unsuccessful attempts to find them, led to the police being called. The police entered the Lyns' house and found that it had been ransacked and that there were spots of blood at various places in the dwelling. Several household items, including large appliances and furniture, were noticed to be missing, and there was no sign of the Lyns. Mr Lyn's Toyota Rav 4 and Mrs Lyn's Toyota Fielder station wagon were also

missing. Both motor vehicles were variously described as being grey, silver or silver-grey in colour.

[2] A trace of the missing items led the police to apprehend the appellants, Messrs Lennox Swaby and Calvin Powell. In fact, the appellants had turned up at Miss Petrina Lewis' house at about 3:00 am on 10 December with some household items that proved to have been taken from the Lyns' house. At the time, they were in a silver Rav 4. They left the household items with Miss Lewis for her to store them. In the days following, items, subsequently identified as belonging to the Lyns, were found in premises associated with one or other of the appellants. On 30 December, the police found the dead, badly decomposed bodies of both the Lyns, at the Martin's Hill garbage dump, in the parish of Manchester.

[3] Both appellants were jointly charged, tried and convicted, on an indictment containing two counts, for the murder of the Lyns. On 20 January 2010, they were each sentenced to imprisonment for life in respect of count one of the indictment, which charged them for killing Mr Lyn, and each sentenced to death in respect of count two, which charged them for murdering Mrs Lyn. They have sought leave to appeal against their respective convictions and sentences. A single judge of this court refused them permission to appeal against conviction but granted leave to appeal against the sentences imposed. They have renewed their applications for leave to appeal against the convictions, before the court.

[4] The evidence against the appellants included evidence produced through the use of technology. All the evidence, including the recent possession of the items, was, however, circumstantial. On the matter of the convictions, the main issue on appeal was whether the various bits of evidence against them, which concerned mostly post-mortem activities, were capable of proving that the men were involved in the killings. There was also the question of whether certain prejudicial evidence, improperly blurted out by a witness, should have resulted in the trial being aborted and restarted before a different jury. In respect of the sentences, it was pointed out, and the Crown conceded the point, that the procedure in relation to the passing of the sentence of death, was flawed and could not be supported.

The grounds of appeal

[5] Dr Williams, with the permission of the court, abandoned the grounds of appeal that had been filed originally on behalf of Mr Powell, and argued, instead, in respect of the convictions, that:

> "The directions of the learned trial judge on the presumption arising from possession of goods recently stolen were inadequate…The jury were not directed how, if at all, they could find the appellant guilty of murder committed in the course or furtherance of robbery, if they found he was in possession of goods recently stolen from the deceased and his explanation was not accepted."

In the circumstances, he argued, the verdict cannot be supported having regard to the evidence.

[6] Ms Bogle, on behalf of Mr Swaby, adopted Dr Williams' formulation of the grounds of appeal in respect of the convictions. In addition to those grounds, learned counsel also argued the following ground:

> "The learned trial judge erred in allowing the trial to continue [after] utterances by Miss Pearl Robinson which was overwhelmingly prejudicial and which prejudice was [sic] incurable by addresses to the jury..."

[7] In this judgment, it is proposed to set out the essence of the evidence adduced by the prosecution and by the defence, respectively, and, thereafter, individually analyse the issues raised by the grounds of appeal.

The prosecution's case

[8] Although during the course of commendable police-work, a number of various elements had to be brought together in supporting the case against the appellants, an attempt to make a brief synopsis will be made. It will be approached respectively from the bases of the connection between the appellants and the Lyns' property, the technological evidence, the oral testimony of witnesses and the answers given by each of the appellants under caution.

a. **The connection between the appellants and the Lyns' property**

[9] A part of the evidence tending to support recent possession of the goods that had been taken from the Lyns' house, is that when the police entered the house at a

little after 10:00 am on 10 December, Deputy Superintendent Daley observed a lot of meat in the kitchen. He said that the meat was in the process of thawing out. This suggests that the meat was removed from refrigeration within hours prior to the arrival of the police. The Lyns' refrigerator was one of the items found at Mr Powell's house.

[10] Apart from both men being in a silver Rav 4 during the early morning of 10 December, Constable Elvis Bowers saw Mr Swaby driving "a silver Toyota Rav Four, silver-gray [sic] Toyota Rav Four" (page 257 of the transcript) at about 9:30 am that day. They went together, in the vehicle, to transact business. At the time, Mr Swaby told Constable Bowers that the vehicle belonged to a lady in Black River.

[11] An employee of the Lyns saw them driving in Mrs Lyn's Toyota Fielder station wagon at about 2:00 pm on Saturday, 9 December. They were on their way to a funeral. At about 10:00 pm on 10 December, Mr Richard Whyne saw Mr Powell driving a grey Toyota station wagon. Mr Whyne also saw Mr Powell driving a grey Rav 4 on 11 December. He had never seen Mr Powell driving any of those vehicles before.

[12] Miss Petrina Lewis, mentioned above, who was once in an intimate relationship with Mr Swaby, and has a son by him, also saw both appellants again in the same Rav 4, on the Wednesday following their early morning visit to her house. The Wednesday was 13 December. Both came to her home and she accompanied them in the vehicle. She, at times, referred to the Rav 4 as a "van". As was the case on 10 December, Mr Swaby was the driver of the vehicle.

[13] She saw Mr Swaby twice on the following day (14 December). On both occasions he was driving the Rav 4. On one of the occasions, he was with Constable Bowers. She asked Mr Swaby about the Rav 4 and he told her that it was "for a family member that come from abroad" (page 83 of the transcript).

[14] She testified that on the Saturday following (16 December), the police came to her house and took the items that Mr Swaby had left there. These included a coffee-maker, a toaster oven, a microwave oven and a bed comforter. All these items were later identified by the Lyns' household helper, Miss Pearl Robinson, as belonging to the Lyns.

[15] On 16 December Detective Sergeant Colin McKenzie and other police officers, at about 11:00 am, went to a dwelling house occupied by Mr Swaby and his mother and there, on the outside of the house, in a shed and in a fowl coop, were appliances such as a washing machine, and other items of furniture, which proved to have been taken from the Lyns' residence. Mr Lyn's golf gear and other items of the Lyns' furniture were retrieved from a locked room inside the house.

[16] The police stopped Mr Powell at about 5:30 pm on 16 December, while he was driving a white Mack garbage truck. Detective Sergeant McKenzie searched Mr Powell's person and found in a billfold that he had in his pocket, Mr Calvin Lyn's driver's licence and his elector's registration card. The billfold also contained two small photographs of the Lyns' children. According to Mr Maurice Lyn, the Lyns' son, those photographs were normally in a locket, which Mrs Lyn usually wore on a chain around her neck. A cellular

telephone SIM card and a Siemens cellular telephone were also taken from Mr Powell. The SIM card was also in the billfold. More will later be said about the SIM card and telephone.

[17] Having apprehended Mr Powell, the police took him, on the same day, to his home at New Green in Manchester. A search of the house resulted in the seizure of a refrigerator and a stove. These were also identified as having been taken from the Lyns' house.

b. The technological evidence

[18] The police, and the jury, were aided by technology in this matter. The first area of technology was evidence of the transaction recording system operated by the National Commercial Bank (NCB) for its Autobanking Machine (ABM). That system showed that Mrs Lyn's card was used, on 10 December at 6:17 am, in an unsuccessful attempt to withdraw money from her account. The attempt failed because of an incorrect personal identification number (PIN) having been used.

[19] As part of the normal operation of the NCB booth housing the ABM, photographic images are taken of the persons utilising its services. The photographic images that were taken during the period 6:07 to 6:14 am on 10 December showed the appellants entering the booth and using the machine.

[20] The next bit of technology was the photographing and "lifting" of an impression of a shoe-print found at the Lyn's house by the police. An expert witness testified that

a comparison of that impression with an impression of the sole of a Lugz shoe, taken from Mr Swaby, showed that Mr Swaby's shoe, with its peculiar nuances from wear, matched the impression.

[21] Next, in the context of technology, was evidence produced in relation to telephony. The evidence was that the SIM card taken from Mr Powell was said to have been assigned with the telephone number 402-7549. That telephone number was Mr Lyn's. A Siemens cellular telephone charger was found in the Lyns' home by the police.

[22] The SIM card had been used in the Siemens cellular telephone, taken from Mr Powell. That telephone and SIM card had been used by a man who answered Mr Lyn's cellular telephone number on 15 December. It was Mr Maurice Lyn, mentioned above, who had made the call to that telephone number. The conversation was recorded by the police and the transcript of the conversation was read into evidence. During the conversation, the man confirmed that he had Mr Lyn's telephone in his possession. He demanded the payment of $7,000,000.00 for the safe return of the Lyns. At that time, the man assured Maurice that his parents were alive and well, but threatened to kill them if he was not paid the sum demanded.

c. The oral testimony

[23] Oral testimony from Messrs Elvis Hewitt and Carey Jebbinson suggested that Mr Powell knew Mr Lyn before December 2006, and knew the place where he lived at 14 Battersea Avenue in Ingleside, Manchester. Mr Lyn lived in close proximity to where those witnesses were working on a construction site. Mr Powell had also worked on

that site for a time and Mr Lyn would come there while Mr Powell was there. According to these witnesses, Mr Lyn was a friendly man, and he would talk to everybody on the work-site.

[24] Other witnesses put the appellants together on more than one occasion within a short time of the Lyns' disappearance, and also put them in oblique contact with the site where the bodies of the couple were found. Mr Whyne, mentioned above, testified that he would normally see Mr Powell driving a Mack compactor garbage disposal truck. Mr Whyne said that Mr Powell would, on a daily basis, drive that truck to the Martin's Hill garbage disposal site in Manchester.

[25] Constable Bowers said that he saw both appellants together in a "dirty white" garbage truck on 13 December at about 6:30 pm. At the time, Mr Powell was the driver of that vehicle.

[26] Miss Lewis also put the appellants in contact with Mrs Lyn's ABM card. She said that when the appellants visited her on 13 December, Mr Swaby sought her assistance with the use of an ABM card. She obliged, and went with them to two separate automatic teller machines (ATM). At each location she used the card in an attempt to withdraw money. Both attempts failed. It was Mr Swaby who produced the card and a number, which purported to be the PIN for the card. Both men were with her on both occasions. After the second failure, she said, Mr Powell said "A ginnal [a Jamaican term for trick] the bwoy ginnal we" (page 77 of the transcript).

d. The answers given by the appellants to the police

[27] The evidence in respect of answers given by these appellants to questions posed by the police commenced with unqualified denial of any knowledge of the happenings in respect of the Lyns and progressed by stages to a qualified knowledge of how their bodies came to be in the garbage dump where the police found them. The progression in respect of each appellant will be dealt with separately, starting with Mr Swaby.

[28] Mr Swaby was apprehended sometime late in the evening of 16 December. He was questioned at the spot where he was held. When questioned about the Lyns being missing he said, "Only the Rav 4 me know 'bout, cause a me did a drive it" (page 308 of the transcript).

[29] He was also interviewed later that evening. He was asked about the furniture that was found at his home, but said that he did not know who they belonged to. He admitted that he had driven a grey Rav 4 earlier in the week but said that it belonged to a policeman named "Nicholas", to whom he had rented a room in his house. Mr Swaby denied knowing where Mr and Mrs Lyn were.

[30] On 27 December, the police conducted another cautioned interview of Mr Swaby, this time in the presence of attorney-at-law, Mr Owen Crosbie. In that interview he said that he had been contacted by Nicholas and he agreed to rent a room to Nicholas. This was at the house that Mr Swaby shared with his mother. He said that on 9 December, Nicholas contacted him and asked him for a contact with a garbage truck. He said that he put Nicholas in contact with Mr Powell. All three met in Mandeville on

the Sunday night (10 December) and they travelled to Black River in the parish of Saint Elizabeth. Nicholas was driving a "greyish colour" Rav 4 (page 619 of the transcript).

[31] At Black River, they unloaded furniture and appliances from another truck into the garbage truck. Having done so, they went back to Mandeville with the goods. Mr Swaby drove the Rav 4, in which Nicholas was a passenger, and Mr Powell drove the garbage truck. From Mandeville, they took some of the items to Miss Lewis' house and some to his house. When he returned to Mandeville, Nicholas gifted him with some of the items and he took them to Ward Avenue, where his sister lived.

[32] He said that he drove the Rav 4 with Nicholas' permission. It was he, he said, who volunteered to lend Nicholas a pair of his old registration plates to put on the Rav 4. He did so because Nicholas requested his help in that regard. He said that he did not know number 14 Battersea Avenue in Ingleside, Manchester. He did not know the Lyns and he knew nothing of their disappearance. He said that he had given the pair of black Lugz shoes that he had been wearing, to the police. He accepted that he had told Mr Powell about a refrigerator and a stove for sale, but that he had seen them being offered for sale by a lady.

[33] The police conducted yet another interview of Mr Swaby. This interview was on 4 January 2007 and again Mr Crosbie was present, representing Mr Swaby. He was asked about going to an ATM at NCB Perth Road on Sunday, 10 December at about 6:30 am and he said that he did not go to that bank. He was asked about going to the NCB banking machine on Wednesday, 13 December after 7:00 pm and he said he did

not go there. Nor did he go to a Bank of Nova Scotia ATM drive-through on 13 December along with Latoya (Miss Lewis). He said he did not give Latoya an NCB key card along with a PIN with instructions for her to withdraw money from the machine.

[34] As was mentioned above, Mr Powell was also apprehended on 16 December. When he was apprehended he was asked about the disappearance of the Lyns and "he said he did not know about it" (page 365 of the transcript).

[35] He was questioned again on 19 December. The questions were administered under caution and were recorded in writing. In the answers given, Mr Powell admitted to knowing the Lyns but denied knowing anything about their whereabouts.

[36] The police conducted a cautioned question and answer session with Mr Powell on 27 December in the presence of Mr Crosbie, who, on the prosecution's case, also acted for Mr Powell. Mr Powell said, in that interview, that Mr Swaby picked him up in "[a] silver Isuzu van, same thing like the police Suzuki Grand Vitara" (page 576 of the transcript). This was at about 4:00 am on Sunday, 10 December. He said that when Mr Swaby picked him up, the appliances and a bag with liquor were already in the vehicle, and they took them to Miss Lewis' house. After leaving the things at Miss Lewis they then went to Ward Avenue in Mandeville and left some other household things at that location. He said that he got the Siemens cellular telephone from Mr Swaby.

[37] Mr Powell accepted that the police had taken some appliances from his home but said that he had bought those appliances from a lady that Mr Swaby had introduced to

him. That introduction and purchase were after the early morning trip to Miss Lewis' home.

[38] He said that he did drive a silver Toyota station wagon to his girlfriend's house on 10 December at about 10:00 pm. He said that a friend of his, named Rohan, owned the vehicle. It was Rohan, he said, who had lent him the vehicle that night and he returned it to Rohan early in the morning on Monday, 11 December.

[39] Mr Powell said that on the evening of 11 December, he borrowed the "silver van" that Mr Swaby had been driving. When he saw Mr Swaby at that time, it was a lady who was driving the vehicle and Mr Swaby was a passenger in the vehicle. He said that he used the garbage truck to transport a settee from Ward Avenue to Mr Swaby's home.

[40] He said that he knew the Lyns but that he did not know anything about their disappearance or their whereabouts. He said that he had never been to their home but he used to work on a construction site on Battersea Avenue, Ingleside, Manchester. That site was right beside the Lyns' home.

[41] The police conducted another cautioned question and answer session with Mr Powell on 29 December. This was also in the presence of Mr Crosbie, acting for Mr Powell.

[42] In this interview, Mr Powell denied ever going to Black River with the garbage truck. He said no photographs were ever taken from him when he was taken into

custody by the police. He also said that Mr Swaby had come to see him once while he was working at Battersea Avenue.

[43] There was a further interface between Mr Powell and the police on 29 December. According to Detective Sergeant McKenzie, Mr Powell told him and some other police officers that "a three night now mi nuh sleep cause it rest pon mi brain. Mi waan tek you to di bodies" (page 640 of the transcript). He then took them to the Martin's Hill garbage dump, where he pointed out a certain area and said, "Check here soh" (page 640 of the transcript). Observations revealed two severely decomposed bodies wrapped in separate sheets in an old rusty box. Those bodies, after forensic tests, proved to be the remains of Mr and Mrs Lyn.

[44] On 31 December, Mr Powell gave the police a written cautioned statement. In it, he said that Mr Swaby and some other men had forced him to go with them into the Lyns' house. He said that when he got there, the Lyns were already dead. The men put the bodies into the van and drove out that vehicle as well as the silver station wagon that they had used to pick him up. He said that he showed them a spot at the dump and the men had disposed of the bodies there. After doing so, the men took him back to the Lyns' house, where they started to "stir up the place and dem start take out the things them out of the place" (page 749 of the transcript). They forced him to take something for himself and he took the refrigerator, stove, television and other things and took them to his house in the car.

[45] He described a significant number of trips to various places with items taken from the house. He also gave the impression that Mr Swaby was not alone in these transactions. At pages 749-750 of the transcript, he said, in part:

> "Then **them** unload weh in the van to the next car that in the driveway, then **them** go back up to the house again, then **them** load up the van and the car and **them** drive out back, drop off some of the stuff up a Lennox [Swaby's] house to down a Lattie [Miss Lewis' house] and from Lattie to Ward Avenue, then from there so now, **them** a go at the NCB Bank go try the card." (Emphasis supplied)

[46] He said that Miss Lewis went out with them to try to get money from the ATM and "the guy them behind in the car" (page 751 of the transcript). After returning Miss Lewis to her home he said (at page 751):

> "everybody come back together now and then start talk to me now and tell me what an what fi say, then them tell me what an what them have lef fi do and stuff like that, an what fi say and no fi call them name, because if me call them name what an what a go happen to me family them…"

[47] He said that on the Sunday evening (10 December), Mr Swaby and others picked him up in the van and took him to where the car was. He kept the car for the rest of the night and returned it to the men early on the Monday morning (11 December).

[48] During that cautioned statement, he addressed the matter of the telephone and the telephone conversation concerning a ransom. This aspect is recorded at pages 752-753 of the transcript:

> "…after them take the car from me, a the last time me see the car an those two guys, otherwise a phone them talk to me on. Then from there so now, them tell me say Lennox a

> go give me a phone to make a phone call an him tell me when to do it an what fi say an stuff like that. I think a deh so it stop. After me make the phone call an ask for the $7 million fi the return of the people them, that a [sic] last time me change words with them."

[49] The police conducted yet another interview of Mr Powell. This interview was on 2 January 2007 and Mr Crosbie was, again, present. In that session, Mr Powell gave further details of his transaction with the men. He said that when they picked him up, they were in the Rav 4 and Mr Swaby was the driver. He said that the bodies of the Lyns were taken in the Rav 4 and all the men including him, travelled in that vehicle.

[50] Mr Powell also gave further details concerning his involvement with the demand for $7,000,000.00. He said that when he made the demand for the money, the Lyns' bodies had already been dumped.

The case for the defence

[51] Both appellants gave sworn testimony. Neither called any other witness in respect of his case.

a. Mr Swaby's case

[52] Mr Swaby testified first. His testimony was very much in line with what he had told the police during his interviews with them. There were, however, a few things in his testimony that require specific mention:

a. He testified that Nicholas’ request for a truck was in the wee hours of Sunday morning. This is opposed to his statement to the police that it was on Sunday night.
b. He stated that he had seen a golf bag among the goods that were removed from the truck in Black River.
c. He did not mention anything in his testimony about introducing a lady to Mr Powell, in respect of the sale of any appliances. He said, instead, that because of Nicholas’ plans for storing the furniture and appliances having fallen through (because Nicholas' brother did not turn up to collect them), Nicholas had asked for his help in storing them. The items, including those which were gifts, were, as a result, deposited at various locations, including his room, Kevin’s house and Miss Lewis’ house.
d. He said that he, along with Kevin and Miss Lewis, did try to use an ABM card at various ABM’s. He said that it was Nicholas who had provided the card (it was inside the Rav 4), and their attempts were made on Nicholas’ instructions. The attempts were unsuccessful and the failures elicited the comment by Kevin that “it look like the bwoy ginnal me”. Kevin was expecting to be paid for his work for transporting the items from Black River.

e. Mr Swaby testified that the answers recorded in the interview by the police were not a true record of the interview. He said that he had told the police that he did go to the NCB banking machine with Miss Lewis and did give a PIN to her to withdraw money. The negative answers to the questions in that regard, as recorded by the police, were therefore, an untrue record of his answers.

f. On the following day (Monday), after further interchange with Nicholas, he put a pair of licence plates, which he had had, on the Rav 4. There were no plates on the Rav 4 from the time he had first seen it.

g. Mr Swaby testified in cross-examination that he had first seen Nicholas with the Rav 4 on the Monday when he first met Nicholas. That would have been almost a week before he drove that vehicle.

h. He testified that all day on Saturday 9 December 2006, he was at his house killing and cleaning chickens that he had reared.

i. He denied the suggestions of the prosecutor that he and Kevin Powell had killed the Lyns' and stolen their property.

b. Mr Powell's case

[53] Mr Powell testified that Mr Nicholas Stewart and Mr Swaby had asked him to keep some things. Those were the items, he said, that the police had found at his home. He said that he had transported them from Black River to Mandeville in a truck. Nicholas should have paid him, but the ABM card, by which the funds should have been accessed, did not work. He agreed that he did drive the Rav 4 when they returned to Mandeville with the items.

[54] He addressed the prosecution's case as follows:

a. No Siemens telephone or SIM card was taken from him.

b. No photographs were taken from him.

c. He did not tell the police that he would show them where the bodies were.

d. He did not know that Mr Crosbie was an attorney-at-law and did not know that he was supposed to have been acting from him.

e. He did not give a cautioned statement, but he had signed some documents without them being read over to him.

f. He did not go to the Lyns' house, did not remove any furniture from their house, and he did not kill them.

g. He had driven a grey Toyota but it belonged to his friend named Junior.

h. He did not make a telephone call to Mr Maurice Lyn and did not speak to Mr Lyn about any money as reward.

[55] He accepted that he often went to the Martin's Hill dump. He denied that he knew the site well. He denied the elements of the prosecution's case as they were suggested to him in cross-examination.

[56] After that, admittedly, lengthy exposé of the relevant parts of the evidence, the grounds of appeal shall now be addressed.

The evidence does not support a conviction for murder

[57] Dr Williams' submissions were concise and pointed. He argued that, in respect of Mr Powell, the prosecution's case rested on two main pillars, namely, his answers to the police and, secondly, his possession of the articles recently stolen from the Lyns' residence. Neither of these pillars, Dr Williams submitted, linked Mr Powell to anything done prior to the death of this couple.

[58] In respect of the first pillar, Dr Williams argued that the answers given by Mr Powell, especially in the cautioned statement, only linked Mr Powell to assisting in the disposal of the dead bodies of the couple. The fact that he showed the police where the bodies were, submitted Dr Williams, does not take the matter any further. Learned

counsel submitted that there was no evidence linking Mr Powell to any plan to rob or to kill the Lyns.

[59] Dr Williams submitted that the learned trial judge, in respect of the second pillar, "did not indicate to the jury the need to and how to distinguish the receiver from the robber in this case". He argued that the presumption which is associated with the doctrine of recent possession is that the person found in possession is either the thief or a receiver. He said the presumption raised by recent possession cannot supply necessary elements to proving the offence of murder, namely, the intention to kill and the act of killing.

[60] Learned counsel argued that the evidence adduced by the prosecution was insufficient to link the appellant Powell to the killing of the couple. Consequently, he submitted, the conviction cannot stand. Dr Williams relied on the cases of **Leon Schroeter v R** [2010] JMCA Crim 47, **Ronique Raymond v R** [2012] JMCA Crim 6 and **Dillon v R** [1982] AC 484 in support of his submissions.

[61] Miss Bogle adopted those submissions. In addition, she argued that the evidence concerning the match of the shoe impression at the Lyns' house, with Mr Swaby's shoe, did not assist the prosecution because there is nothing to indicate that the impression was made prior to the Lyns' death. Learned counsel, as did Dr Williams, supported her submissions with an extract from Archbold 2007, in which the learned editors addressed the issue of recent possession. They state, in part, at paragraph 21-126:

> "Every case depends on its own facts. There is no magic in any given length of time. However, it is submitted that in many cases where the *only* evidence is that of recent possession, it will be impossible to exclude the possibility that the defendant was merely a receiver of the stolen property: in such cases, a count of burglary ought not to be left to the jury." (Italics as in original)

[62] It is to be noted, however, that immediately following that opinion, the learned editors issue a caveat. They say:

> "However, that applies, where recent possession is literally the only evidence. The reality is, that in the great majority of cases there are other pieces of evidence which tend to point the case one way or the other."

[63] Mr Walcolm, for the Crown, argued that the totality of the evidence was more than adequate basis for the jury to have been satisfied that the appellants were involved in the killing of the Lyns. He pointed to the following factors in support of his submissions:

a. the recent possession of the Lyns' property;

b. the previous connection between Mr Powell and Mr Lyn;

c. Mr Powell's prior knowledge of the Lyns' house;

d. Mr Powell having showed the police the location of the bodies; and

e. the explanations that Mr Powell gave to the police for his possession of the Lyns' property.

[64] Miss Thompson, also appearing for the Crown, supported Mr Walcolm in those submissions. Both submitted that the learned trial judge had properly directed the jury on the correct manner of assessing this evidence.

[65] In assessing those submissions, it is noted that all counsel appearing have acknowledged that possession of recently stolen goods is, by itself, insufficient for a jury to convict an accused person of an offence involving the use of violence. That principle was set out in the Scottish case of **Christie v H M Advocate** [1939] JC 72. In that case, Lord Fleming accepted that recent possession of stolen goods, in the absence of a reasonable explanation for that possession, allowed a jury to conclude that the possessor was involved in the manner by which the goods were taken. In that case, the method was housebreaking. There was, however, a limit to the extent that the principle could apply. He said in concluding his judgment:

> "I should like, however, to add that, while, I quite accept the view that the de recenti possession of stolen property in regard to which no reasonable explanation is given may be regarded as sufficient proof of all forms of theft, **as at present advised I am not prepared to hold that it is sufficient proof of any crime which involves the use of violence**." (Emphasis supplied)

[66] The principle set out in **Christie** was applied in another Scottish case, **Cameron and Others v H M Advocate** [1959] JC 59, where the method of taking involved the use of explosives. Indeed, in respect of one of the appellants in that case, it was held that the presence of his fingerprints on the stolen property was insufficient, by itself, to found a conviction. The Lord Justice-General (Clyde) stressed that, in addition to

proving recent possession, there was a need for the prosecution to adduce "other criminative circumstances pointing to the guilt of the accused". The court was, nonetheless, prepared to find that:

> "...if the evidence shows that the only way in which that theft was committed was by blowing open the safe with explosives, then the doctrine [of recent possession] must clearly apply to a case of theft by explosives. For, if the theft took place at all, it took place only because explosives were used."

[67] Their Lordships found that the case against Mr Cameron rested on more than just his fingerprints to prove his possession of the stolen property. The evidence was that, on the approach of the police, he attempted to dispose of a container in which the property was housed. Again, their Lordships baulked at extending the principle of recent possession to circumstances involving the use of violence. The Lord Justice-General stated:

> "If a charge of physical assault on another person were involved as well as theft, there would, in my opinion, be no warrant in principle, nor in authority, for applying the doctrine of recent possession in proving the charge of assault."

[68] Guidance to trial judges, in addressing the issue of recent possession, can be found in yet another Scottish case, **Fox v Patterson** [1948] JC 104. In that case, the Lord Justice-General (Cooper), after identifying the presumption that recent possession imports, impressed the need for all three elements of the concept to be present. He said:

> "If the rule is to have full effect...three conditions must concur:-(a) that the stolen goods should be found in the possession of the accused; (b) that the interval between the theft of the goods and their discovery in the accused's possession should be short-how short I need not in this case inquire; and (c) that there should be 'other criminative circumstances' over and above the bare fact of possession. If all these conditions are not present...the facts which can be proved may well constitute ingredients (quantum valeant) in the case, and may combine with other factors to enable the Crown to establish guilt. But, unless all three conditions concur, the accused cannot be required to accept the full onus of positively excluding every element of guilt. Even when they concur, the weight of the resulting presumption, and the evidence required to elide it, will vary from case to case."

[69] From those cases, it appears that the principle to be applied is that where the offence involves the use of violence, then the presumption imported by the recent possession of the goods stolen, does not apply. The three conditions mentioned above, even though all present, only constitute circumstantial evidence that may link the possessor to the offence involving the use of violence. It is for the jury to decide if the evidence leads to the sole conclusion that the possessor is the perpetrator of that offence. As was stated in Archbold, quoted above, each case will depend on its own facts.

[70] The facts in **R v Portillo** [2003] OJ No 3030 provide an instance where recent possession was one element of the circumstances, which were capable of resulting in a conviction for murder. The Ontario Court of Appeal so found, after reviewing the following:

a. the deceased had an argument with someone in his apartment;

b. whoever was in the deceased's apartment left in a hurry;

c. the departure occurred immediately after the homicide;

d. the device used to strangle the deceased (bicycle handle-bars wrapped into an extension cord), had to be assembled; suggesting that the strangulation was not a spur of the moment act;

e. the accused was in possession of the deceased's bicycle two days after the homicide; and

f. that bicycle had been taken during the night to early morning of the homicide.

[71] According to the court, on that evidence:

> "A jury could reasonably infer that the bicycle was stolen at the time of the homicide and that [the accused] stole it. A jury could also infer that theft was the motive for the homicide and that the thief was a party to the killing...The evidence placing [the accused] at the scene when the deceased was killed following a quarrel, his quick exit from the apartment, combined with the evidence that [the accused] stole the deceased's bicycle at the time of the homicide provided a basis upon which a reasonable jury, properly instructed, could convict [the accused] of murder." (Paragraph 54 of the judgment)

[72] Miss Thompson relied on **R v Portillo** and the cases of **R v Coffin** [1956] SCR 191 and **R v Exall** (1866) 4 F & F 922; 176 ER 850 in support of her submissions. The first two are Canadian cases and they seem to adopt the stance taken in **R v Exall**. In **R v Exall** Pollock CB, in addressing the jury, seems to suggest that recent possession may be sufficient to link the possessor to an offence involving violence. He said (at pages 924-927):

> "The principle is this, that if a person is found in possession of property recently stolen, and of which he can give no reasonable account, a jury are justified in coming to the conclusion that he committed the robbery.
>
> **And so it is of any crime to which the robbery was incident or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime**.
>
> The law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable. The strength of the presumption, which arises from such possession, is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property." (Emphasis supplied)

[73] The learned editors of the English Reports, in which **R v Exall** was reproduced, were somewhat critical of that approach by the learned Chief Baron. Their view is that

he had, somewhat, overstated the position. They opined that "the weight and effect of the evidence [of recent possession] would entirely depend on the circumstances", and in support of their stance pointed to several cases along that vein.

[74] A close reading of both **R v Portillo** and **R v Coffin** shows that, despite espousing the dicta in **R v Exall**, in both cases, the court relied on evidence other than the simple fact of possession. They found that there was sufficient evidence from other circumstances on which the juries could have convicted. The circumstances in **R v Portillo** have been set out above. In **R v Coffin** a number of other factors, including Mr Coffin's untrue statements to the police as to his whereabouts, were found to have supported the evidence of recent possession. It seems, therefore, that it would not be entirely accurate to say that the Canadian cases support the principle that recent possession, by itself, could support the conviction for an offence involving violence.

[75] The approach taken by this court is more akin to that used in the Scottish cases cited above; that is, that the recent possession by itself is not sufficient to found a conviction. It can only be part of the evidence that the tribunal of fact may examine along with other evidence. Thus, in both **Ronique Raymond v R** and **Ashan Spencer v R** SCCA No 14/2007 (delivered 10 July 2009), it was held that recent possession of goods stolen during a robbery was insufficient to support weak identification evidence.

[76] Applying those principles to the instant case, would mean that the recent possession by these appellants of the Lyns' property, by itself, would be insufficient to

ground a conviction for murder. It would only constitute one of the elements contributing to the prosecution's case against the appellants. Miss Thompson and Mr Walcolm are, however, correct in pointing to the totality of evidence that connects the appellants to more than just the receipt of stolen property. These incriminating circumstances would, at least, include:

a. the use of ropes and neckties to bind, and of the telephone wires and neckties, to strangle the Lyns. This tends to suggest that the killing was intentional;
b. the pillage of the Lyns' home and wholesale removal of their furniture and appliances during the hours of darkness of the morning of 10 December 2006. This tends to suggest that the motive for the killing was robbery;
c. the short span of time (barely 12 hours) between the time the Lyns were last seen alive at a church, and the time when the appellants showed up with the Lyns' property at Miss Lewis' home; and,
d. the contradiction between Mr Swaby's account for possession of the property, and that of Mr Powell, bearing in mind, of course, that neither account could incriminate the other appellant.

[77] In addition to the above, the evidence peculiar to Mr Swaby is:

a. the fraudulent placing of his licence plates on the Rav 4;
b. the discovery of a mass of the Lyns' property at premises with which he was associated;
c. his use of the Rav 4 during the days following the disappearance of the Lyns;
d. his association with the attempts at using the ABM card, despite his denial (on the prosecution's case) of having been involved with those attempts;
e. the match between the tread characteristics of his shoe with the shoe-print found in the Lyns' house, which house he denied having entered; and
f. the credibility, or lack thereof, of his account that Nicholas had given him some of Nicholas' possessions, simply because Nicholas' plans for their storeage had fallen through.

[78] The evidence peculiar to Mr Powell was:

a. his association with the attempts at using the ABM card;
b. his use of the RAV 4, and a vehicle similar in description to Mrs Lyn's Toyota, in the days following the disappearance of the Lyns;

c. his possession of a telephone and SIM card used by a man to make a telephonic demand for ransom money and threatening death if the demand were not met;

d. his possession of the very personal items of the pictures from the locket that Mrs Lyn customarily wore about her neck. This suggests a direct interaction with her;

e. his knowledge of the location of the bodies;

f. his initial denial of, and his later conflicting accounts as to, his coming into possession of the Lyns' appliances; and

g. his inconsistent answers to the police about having gone to the Lyns' house;

[79] These factors were ample threads of evidence comprising the rope representing the prosecution's case, on which a jury, properly directed, could convict the appellants. It is, therefore, the directions to the jury concerning this evidence, which must next be addressed.

[80] The learned trial judge, during her initial charge to the jury, directed them extensively on the issue of circumstantial evidence. She initiated her charge in this way:

> "Circumstantial evidence is evidence from which you may infer the facts in issue and you will recall the directions I gave you about inferences. Nobody saw either of these accused men do anything but that does not mean that

because the prosecution cannot produce a witness who actually saw the killing, the case against each accused cannot be proved. The case against each accused can be proved by what is known as circumstantial evidence…." (page 2035 of the transcript)

[81] The learned trial judge gave the accepted standard directions about the conclusion to which the collective evidence should lead before the jury could convict. She said at page 2038 of the transcript:

> "All the circumstances must point to one conclusion. If one circumstance is not consistent with guilt then the whole thing collapses. If all the circumstances are consistent with guilt but equally consistent with something else that is not good enough. What you must have is an array of circumstances that point to one conclusion and one conclusion only and that is the guilt of the accused."

[82] A direction on recent possession did not feature in the learned trial judge's summation to the jury, which lasted several days. It was only at the end of her summation, and at the suggestion of learned counsel for the prosecution, that the learned trial judge addressed the issue of recent possession. In that regard, after identifying the various places at which the goods were found, she said, at pages 2474-2475 of the transcript:

> "Where stolen goods are found in the possession of a person, recently after the stealing, then subject to any explanation of others, a jury may presume that he came by the goods dishonestly and it depends on the circumstances, whether he is guilty of stealing them or of receiving them, knowing them to have been stolen. In this case, before the doctrine can be applied, the jury must be satisfied and the duty is on the prosecution to satisfy them that A: The goods were stolen. B: They were in the possession of the accused C:

Recently after the stealing And D: Any explanation offered is untrue."

[83] The learned trial judge went on to explain the circumstances in which the jury should acquit the appellants after hearing their explanation. She then dealt with the issue of what is considered recent and in what circumstances the jury may infer guilty knowledge. She qualified those statements at pages 2476-2477:

> "…This relates really to a case of recent possession in regard to larceny. But, it is relevant in this case because of the time that elapsed between the Murder and the removal of the goods.
>
> Having regard to the evidence, Mr. Foreman and members of the jury, I don't know what you make of it. It seems to me that the goods were removed with the type of goods that were involved, the type of appliances that were removed at the time that the murder took place, either before or after, but certainly it is simultaneous with the murder. The explanation that has been given by each accused man is that each accused man was involved in an exercise of moving these items from a broken down truck to a working truck and these items, if you accept the identification of Miss Robinson, that they were taken from the Lyns [sic] house. These items were distributed in the homes of the accused Swaby, the accused Powell and the [sic] Miss Lewis, who is the baby mother of the accused Swaby and, in fact, I think there is evidence that Swaby offered to buy some of these things from this person, Nicholas Stewart. All these things you would have to take into consideration, because it is the evidence of both accused Swaby and accused Powell that these goods were being moved by them on the night of the 9th to the 10th of December and that is the time that the Lyns were murdered. So you will have to say what you make of it."

[84] That direction must be considered against the background of the directions on circumstantial evidence and the learned trial judge's comprehensive rehearsal of the

evidence. Dr Williams complained that, in that direction, the learned trial judge did not assist the jury in distinguishing between the robber and the receiver. According to learned counsel the presumption was that Mr Powell was either the receiver or the robber. He opined that this was more a case of accessory after the fact, but that was not the charge that was laid against Mr Powell.

[85] Dr Williams' submission virtually ignores the fact that the jury were entitled to consider all the evidence that was adduced in addition to the recent possession. There was the evidence of the manner by which the Lyns were killed, which, as mentioned above, indicated a deliberate killing in furtherance of robbery. The jury were also entitled to consider the various denials and conflicting explanations by Mr Powell as they were entitled to consider Mr Swaby's denial of having entered the Lyns' house, in the face of evidence that a shoe-print matching his shoe was found therein.

[86] All these were issues of fact for the jury to consider. The learned trial judge placed all that evidence before the jury and having deliberated on it, they clearly rejected the evidence of Messrs Swaby and Powell that they saw these goods in a disabled truck in Black River. The two pillars, as Dr Williams described them, of recent possession and untrue statements would have been enough for the jury to convict these appellants.

[87] Miss Thompson also pointed out that the learned trial judge directed the jury on the method of treating with any lies that they found that the appellants, or either of them, had told. She gave the appropriate Lucas Direction (**R v Lucas** [1981] QB 720

at 724, 73 Cr App Rep 159 at 162), concluding with the following, at pages 2047-2048 of the transcript:

> "…And this is most important, Mr. Foreman and members of the jury, the motive for the lie must have been a realisation of guilt, and a fear of the truth, that must be the motive for the lie. A realization [sic] of guilt and a fear of the truth. So that is if you find the accused told lies and you find that the motive of [sic] telling those lies was a realization [sic] of guilt and a fear of truth, **then you can treat those lies as tending towards proof of guilt of the offence charged**…" (Emphasis supplied)

[88] It cannot be denied that the learned trial judge did not give a specific direction on the point that recent possession, by itself, could not be sufficient to link the appellants to the killings. That failure, however, in the context of the other evidence and directions outlined above, would not have resulted in a substantial miscarriage of justice. If necessary, therefore, this would be a proper case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. The jury, having considered all of this evidence, even if the proper direction had been given, would undoubtedly have arrived at the same verdict, adverse to the appellants. This ground of appeal fails.

The wholly prejudicial evidence by a witness called on behalf of the Crown

[89] This ground of complaint emanated from a statement by Miss Pearl Robinson, the Lyns' household helper. This witness did not know either of the appellants before but nonetheless found it necessary to state that a person who was present when she

was identifying the Lyns' property to the police, was "the one that kill his baby mother". She did not link that statement to any particular person.

[90] The statement was made during examination in chief, in the following context:

> "Q. You told us on one of the occasion [sic] Grey Beard and one of the detective [sic] was there. The second time who was there?
>
> A. The second time I went the two young men that commit the crime they were there. I don't really know them. It is the first I am seeing them so…
>
> Q. You said you did not know them before that day?
>
> A. No, I didn't.
>
> Q. Did you [ever] see either of them before that day?
>
> A. No, only one of them I identify and one time I see the one that kill his baby mother. I saw…
>
> Q. Okay.
>
> HER LADYSHIP: No, wait" (pages 1358-1359 of the transcript)

[91] Undoubtedly, that situation required a decision by the learned trial judge. The decision was to either terminate the trial and order a new trial, or to give a warning direction to the jury. The learned trial judge chose the latter option. The question for this court to decide is whether any direction could have cured the effect of the statement, and if so, when ought it to have been given and in what terms.

[92] The learned trial judge, having heard submissions by defence counsel and the lead counsel for the prosecution, decided that the "discharge of the jury [after six

weeks of trial] would be disastrous". She decided to give the direction to the jury very shortly after the statement was made and before the examination in chief was completed. After describing the witness as "talkative" and recounting the evidence set out above, the learned trial judge said in part, at (pages 1370 of the transcript):

> "Mr Foreman and members of the jury, I would like to point out to you that she has not identified anybody here as being that person. That it forms no part of this case and I would ask you to disregard it entirely, wipe it out of your minds. It has nothing to do with this case and it should not be considered by you at any time. It is a remark. It was not explored. We don't know exactly what is what."

[93] The learned trial judge repeated the admonition to the jury several times during that direction. She indicated that she would not mention it again during the trial and she did not. She concluded the direction with the following statement:

> "I am sure the jurors will take the good advice I have given them and consider the very substantial amount of evidence that there is otherwise in this case and not dwell upon [the improper statement]." (page 1371 of the transcript)

[94] Ms Bogle argued that the prejudice to the appellants could not be cured by any direction by the learned trial judge. Learned counsel submitted that a "mistrial should have been called immediately". She described the reasoning concerning the loss of the time that had already been devoted to the case as "unacceptable".

[95] Miss Thompson, in response to Miss Bogle's submissions, stressed that not only did the learned trial judge deal with the issue immediately, but also warned the jury, on

more than one occasion during the summation, to avoid speculation. The cumulative effect would have cured any potential prejudice caused by the unfortunate statement.

[96] In assessing the issue, it must be borne in mind that the treatment of situations, such as that which has been described above, is largely left to the discretion of the trial judge. The authority that is most cited in support of that point is that of **R v Weaver** [1967] 1 All ER 277. In that case, Sachs LJ stated at page 280:

> "…The decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of the at discretion. When that has been said, it follows…that every case depends on its own facts….it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged."

[97] That quotation was considered by this court in **McClymouth (Peter) v R** (1995) 51 WIR 178 at page 184. Carey JA, in delivering the judgment of the court, reiterated that this court will be slow to interfere with the exercise of the trial judge's discretion "unless it feels that the applicant would be justified in saying that what occurred was devastating".

[98] What occurred in the instant case was not devastating. The witness had been called to identify property that had belonged to the Lyns. She did not identify the persons who were present when she had identified the property to the police. Nor did she ascribe the improper statement to any of the two appellants. She made it clear

that she did not know either of them. In the circumstances, the case was different from that of **McClymouth**, where, although there were several persons on trial, the witness cast outrageous aspersions at, not only a specific one, but also at his counsel. The statement was:

> "I am not telling a lie. Yuh talking like seh is the first murder Levy commit and you stand up for him. This is the second murder but I didn't business with the first one."

[99] The court found that because the case depended wholly on the evidence of that witness and on the credit of that witness, it would have called for "a remarkable mental agility on the part of any juror to divorce from his mind…that this credible witness had not said that the appellant was a repeat murderer".

[100] In the circumstances, the learned trial judge was quite correct in her decision to give a direction rather than to discharge the jury, in her timing of that derection and in the content of the direction. There is no merit in this complaint.

The sentence of death was improperly imposed

[101] In response to the second issue raised by Dr Williams, learned counsel for the Crown conceded that the sentence of death cannot be sustained. As with a number of previously decided cases on this point, this trial was concluded before the decision of **Peter Dougal v R** [2011] JMCA Crim 13. The court at first instance would, therefore, not have had the benefit of the direction, given in **Dougal**. Nonetheless, the principle that led to the setting aside of the sentence of death in **Dougal**, applies equally to the instant case. As in the other decided cases (see for example **Alton Heath and others**

v R [2012] JMCA Crim 61), the sentences of death imposed in the instant case, must be set aside and sentences of imprisonment for life substituted.

[102] The substituted sentences must be associated with an order as to an appropriate number of years before each appellant will be eligible for parole. In order to determine the number of years in each case, some comparison with other cases will provide guidance. For a proper comparison to be conducted it is necessary to indicate the kind of death the Lyns must have suffered.

[103] The police officers who first entered the Lyns' residence saw evidence that indicated that the assailants bound their victims with, among other things, neckties. These were seen in the house. Droplets of blood were also seen in the house. The pathologist who examined the bodies indicated that both Mr and Mrs Lyn died from ligature strangulation. Their bodies were, as mentioned above, thrown into a garbage dump.

[104] In **Ian Gordon v R** [2012] JMCA Crim 11, three men entered premises on which a small wooden house was located. They fired several shots through the front and both sides of the house and then left. Two men, who were inside the house at the time, were fatally shot. Mr Gordon was identified as one of the assailants. He was ordered to serve 30 years imprisonment before being eligible for parole. That case does not seem to have the level of personal interaction and callousness that must have been associated with the killing of the Lyns.

[105] In **Alton Heath and others v R**, the appellants were convicted of the murder of two young women. The evidence adduced demonstrated that, prior to the killing, the women had been abducted and taken to a location where other men were awaiting their arrival. Several men raped the women, made fun of them afterwards and then told them that they were to be killed. The men marched them to a sewage plant where they shot the women and threw them into a sewage pipe leading to the sea. Their bodies were never found. Two of the three convicted men were each ordered to serve 35 years imprisonment on each count before becoming eligible for parole, and their respective sentences were ordered to run concurrently. The third man is yet to be sentenced, his sentence of death, having been set aside.

[106] **Alton Heath and others v R** is more consistent with the kind of death the Lyns must have suffered. Because of the heinous nature of the killings we find that the appellants should each serve 35 years imprisonment before becoming eligible for parole.

Conclusion

[107] An assessment of the evidence in this case reveals that there was a significant body of evidence, in addition to the fact of recent possession of the Lyns' property, to which the jury could point, in affixing culpability for these killings to the appellants. The learned trial judge's direction to the jury in respect of the matters that they were required to consider, cannot be faulted. As a result, the convictions were justifed and will not be disturbed.

[108] In concluding this judgment, tribute must be paid to all parties involved in the investigation and trial of this matter. The police obviously poured significant resources into this effort and worked diligently at identifying the perpetrators. As a result, 47 witnesses gave evidence for the prosecution, at a trial which lasted almost 11 weeks. Counsel for the prosecution and the defence, as well as the learned trial judge, must all be commended for harnessing and managing the massive amount of material involved in the trial process.

[109] Based on the above reasoning, the orders are that the applications for leave to appeal against conviction are refused and the convictions are affirmed in each case. The appeal against sentence is allowed in respect of count two of the indictment and the sentence of death, imposed in each case, is set aside. A sentence of imprisonment for life is substituted in each case. We further specify that each appellant shall serve 35 years imprisonment before becoming eligible for parole. In light of the fact that the appeal has been allowed against sentence, there shall be no adjustment in respect of the date on which the sentences are to be reckoned as having commenced. Accordingly that date is the original date of sentencing, which is 20 January 2010.