JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 202/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA

VS.

WAYNE SPENCE

Michael Lorne for Appellant

Bryan Clarke for Crown

May 1, 2, and June 18, 1990

ROWE P.:

Tragedy of the most revolting character occurred on a public passenger bus on the night of December 7, 1987 in the Caymanas area of St. Catherine. Pamela Johnson, a police constable, and Ferdel Pearson, were murdered on that bus after the several passengers and the bus crew had been robbed. During police investigations into this tragedy there was a shoot-out between police officers and suspects. Three men all positively identified as participants in the murder, robbery and rape episode were shot and killed. Spence, the appellant herein, who at the time of the shoot-out was in police custody was charged and convicted for murder before Theobalds J. and a jury in the Gun Court Division of the Home Circuit Court on October 13, 1988. Against his

conviction, Mr. Lorne has filed and argued ten grounds of appeal.

Identification was not a contested issue in this case as the appellant freely admitted that he was in the bus at the time of the murders. Approximately six passengers, a conductor and a driver were in the public passenger bus as it drove to Greendale from Spanish Town en route to Kingston. Four men entered the bus at Greendale and seated themselves inconspicuously about. At Caymanas someone called out, "One stop driver", which is a request for the bus to stop. The driver obeyed. One witness recalled that: "Four men get up and say: 'Nobody move tonight'." Three of them were armed with guns and the fourth with a knife. The driver who was ordered to reverse the bus on to Dyke Road recalled how one of the four men who had joined the bus at Greendale moved from where he had been sitting in the bus, came beside him, pulled a gun from his waist and said: "Boy, do as I tell you or you are dead tonight." The bus was reversed from the highway on to Dyke Road. The passengers were systematically robbed. A fat man, the obvious gang leader ordered the robbers to "search everybody because may be they have gun on them." To the appellant this leader said: "Soljer, cut off the rass claut driver head because him won't give me the rest of the money." Thereupon said the driver, the appellant, "had the long knife in his right hand, a long white knife, and held back my head like that." The driver pleaded: "Star, don't mek sense cut off mi head because I give you what I have already." Relief came to him, in that the appellant removed the knife from his neck and ran down to the middle of the bus when the identity of one of the female passengers was discovered. One witness heard a voice say: "This ya gal a police." Another

witness said he heard the words: "This girl is a police and we nah leave her tonight." Whatever were the exact words, this information was the signal for the appellant to release the bus driver and to join the men in the middle of the bus. The woman was ordered to remove her clothes. First, she was raped by the fat man from behind. Two Crown witnesses swore that the appellant then took his turn to rape this woman while standing behind her. While she was being ravished the police constable pleaded with the rapists to abuse her in any way in which their lust would be fulfilled provided they did not kill her. "Take it", she said, "how you want but don't kill me." She was shot twice. One shot entered the left posterior parietal scalp, travelled through the brain to the left temporal region. The other shot entered the left anterior chest, travelled through the chest cavity, the heart and left lung and lodged in the tissues of the left posterior chest.

Karen Pearson, an 11 year old girl gave evidence of being present on the bus and observing the robbery after which her father was shot in his mouth. Her evidence during examination-in-chief did not directly implicate the appellant. In the course of a very long and detailed cross-examination Karen twice answered that she did not see the appellant either rape or shoot the "police lady", see pages 88 and 92 of the Record. Counsel persisted in his cross-examination and at page 103 of the Record the following questions and answers appear:

"Q: Karen, of the men that you saw on the bus, was there a clear man?

A: Yes, Sir.

Q: A slim clear man?

A: Yes, Sir.

Q: This slim clear man, did you see him rape the police lady?

A: Yes, Sir.

Q: Did you see him shoot the police lady?

A: Yes, Sir."

At page 100, the witness was asked:

"Q: That's what I am asking you now, how would you describe that gentleman sitting there in the yellow shirt?

A: I would say that him is clear, that him is slim, only that I have to say.

. . . . . .

Q: This gentleman there, you saw him with a gun at any time?

A: Only time I saw him with the gun is when the fat man give him the gun."

In these answers the witness was responding that she saw the appellant rape the deceased woman and she saw him shoot the deceased woman with a gun which he received from the fat man. Theobalds J. did not invite the jury to rely upon the evidence of Karen Pearson that the appellant himself shot Pamela Johnson.

Ferdel Pearson was sitting at the back of the bus in the company of his daughter. One of the robbers thought he recognized Mr. Pearson to be a Prison Warder who lived at Drewsland. Mr. Pearson promised not to reveal the identity of the robber, nevertheless, after he was robbed of his money

he was shot twice. One bullet entered his left temple region, travelled through the skin, underlying tissues, obliquely backwards and lodged in the sixth cervical spine. The other bullet entered at the lateral aspect of the left chest, just below the axilla, travelled backwards to the right and lodged in the thoracic spine.

On December 9, 1987 the appellant was taken into custody. He was told by the investigating officer that the officer had reason to believe that he and others were involved in the murder of Pamela Johnson and Ferdel Pearson. Upon caution the appellant is reported to have said: "Me did de deh but a force them force me." The appellant directed the police to the hide-out of three men who were killed in a shoot-out with the police and later identified as three of the robbers who were on the bus the night before. At trial the appellant made an unsworn statement which filled fifteen foolscap pages. In that statement he said he bought and sold ganja which brought him into contact with "Fatta", "Gunna" and "Paye". Together they boarded a bus at Greendale en route to Kingston. "Gunna" initiated the robbery. "Fatta" and "Paye" drew their guns, and "Fatta" holding him at gun point, handed him a knife and ordered him to search the passengers. In graphic detail he told of the command from "Gunna" that he should cut off the driver's neck and how he hesitatingly approached the driver all the while explaining that the driver had no money. The statement referred to the discovery of the identity of a passenger as a police-woman, of another as a prison warder, and of the threat to kill the police-woman. According to the appellant he started to say:

> "O God, noh kill nobody, man. Oonoo noh get the money from the people dem already? 'Low the people dem."

"Gunna" ordered him to be quiet and sent him out of the bus to be look-out man. "Paye" gave him a helping push as he fell outside. While outside he saw "Fatta" and it seems another man raping the police-woman. He was threatened by "Paye" to pay attention to on-coming motorists and to cease to interfere in their activities. He spoke too of the shooting while he was still outside and that he was later forced to join the three gun-men. He did not benefit from the proceeds of the robbery and during the night he escaped from the house to which the men had repaired.

Mr. Lorne submitted that the effect of this statement was that the appellant's participation was out of fear for his life, and when he realized that the robbers intended to kill the two persons he begged for their lives, consequently the appellant was not a party to the common design to rob or to murder.

We will endeavour to deal with the several grounds of appeal. The first complained that the trial judge was biased and failed to put adequately the case of the defence before the jury. There was a measure of confusion as to the gravamen of the defence. At page 180 of the Record the trial judge identified the vital issue in the case to be whether or not the prosecution was able to prove that the appellant was acting in a common design with the other three men. Then he continued:

> "It may have come as a surprise to you, certainly did to me, that duress was not being advanced as a defence in this matter, but you have had that statement straight from the defence Counsel, straight from the lawyer who represents the

> "accused that duress is not the defence's case. Notwithstanding that, I consider it my duty to tell you briefly what duress is."

In the very next paragraph the trial judge withdrew the defence of duress from the jury's consideration. He said in express terms that the defence of duress did not as a matter of law apply to a case of this nature. This is how he treated the matter:

> "Now, before an accused person can be convicted of any crime, the prosecution has to prove that the act by means of which the crime was committed was done by the conscious free will of the accused. So, where, for example, the act was committed by the accused under physical compulsion, that is to say, where a present fear of death or serious bodily injury operated on his mind and affected his will, then he commits no crime. But you have to bear in mind, and I am ruling here as a matter of law that the defence of duress does not apply in cases of murders such as you are hearing today. That defence does not apply to this case."

In Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653, by a majority, the House of Lords held that on a charge of murder the defence of duress was open to a principal in the second degree, that is to say, to an aider and abettor. This case was extensively considered by the Privy Council in Abbott v. The Queen [1976] 3 W.L.R. 462. Lynch's case (supra) was considered binding for what it decided but the Privy Council refused to extend it to cover principals in the first degree to murder. Their Lordships advanced the most convincing reasons why it was illogical and immoral for the defence of duress to be available

in murder cases and held that such a defence of duress was not available to a principal in the first degree who did the actual killing. The House of Lords grasped the opportunity in R. v. Howe [1987] 1 All E.R. 771 to re-consider the law of duress as it affects the crime of murder. The House unanimously over-ruled Director of Public Prosecutions for Northern Ireland v. Lynch (supra) and held that the defence of duress is not available to a person charged with murder whether as principal in the first degree (the actual killer) or as principal in the second degree (the aider and abettor).

I quote a short passage from the speech of Lord Griffiths at page 790:

> "As I can find no fair basis on which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, I would depart from the decision of this House in Lynch v. DPP for Northern Ireland [1975] 1 All E.R. 913, [1975] AC 653 and declare the law to be that duress is not available as a defence to a charge of murder or attempted murder."

With the utmost respect, we entirely agree with the reasoning of Lord Griffiths and find ourselves persuaded by the several examples he gave of the consequences for the law and for the society if persons could set up the defence of duress to excuse themselves completely for their part in the commission of the offence of murder. A passage from his judgment on page 789 of the Report is worth reproducing. There Lord Griffiths said:

> "It seems to us that it would be a highly dangerous relaxation in the law to allow a person who has deliberately killed, maybe a number of innocent people, to escape conviction and punishment altogether because of a fear that his own life or those of his family might be in danger if he did not, particularly so when the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself."

We will only add that in our opinion if a man has such a high regard for his own life and for that of his loved ones, he ought as a member of his society to have an equally high regard for the lives of innocent third parties. We adopt and apply the decision of the House of Lords in R. v. Howe (supra) to Jamaica. We are enabled to take this route through the decision of this Court in S.C.C.A. 79/84 Jamaica Carpet Mills v. First Valley Bank (unreported) decision on September 22, 1986. In that case we referred to the statement of principle enunciated by the Privy Council in Tia Hing Cotton Ltd. v. Liu Chong Bank [1985] 2 All E.R. 947 at 958b that:

> "Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords decision which covers the point in issue."

The Jamaica Carpet Mills case (supra) raised the questions whether a Jamaican Court could award damages in foreign currency in a breach of contract case and if it did should the conversion date into Jamaican currency be the breach date or some later date including the date when leave to enforce judgment was given. This Court did not follow the Privy Council decision in Syndic in Bankruptcy of Salim Nasrallah

Khoury vs. Khayat [1943] A.C. 507 which applied the breach date rule but preferred the decision of the House of Lords in Millangos v. George Frank (Textiles) Ltd [1975] 3 All E.R. 801.

We take the view that the law of duress in Jamaica as it applies to cases of murder is the same as it is in England and consequently the defence of duress is not available to a person whether he be a principal in the first or second degree, that is to say, whether he be the actual killer or an aider or abettor. Defence Counsel had a responsibility to tell the jury that the appellant was not relying on the defence of duress and in fulfilment of that duty, the trial judge ought not to have been taken by surprise. The issue of duress was properly withdrawn from the jury and the initial confusion did not in our view embarrass the defence or the jury in any way.

In directing on the burden and standard of proof, the trial judge on more than one occasion used the term "substantial doubt" and that led Mr. Lorne to argue that "substantial" meant something more than "reasonable" and consequently the standard of proof was lowered. At page 177 of the Record, Theobalds J. told the jury about the presumption of innocence and continued:

> "He is presumed to be innocent, and the standard of proof is that after hearing all the evidence, including what the accused person said from the dock, you must be satisfied to the extent that you feel sure of his guilt before you can properly return a verdict of guilty. Put another way, if you have any reasonable doubt in relation to the guilt of the accused, or in relation to any aspect of the case, you have to give the accused person the benefit of that doubt, but that expression Mr. Foreman and Members of the Jury, does not include any light, fanciful doubt that can pass through the mind of any individual at any given time; it is not the sort of doubt, for instance, which you would raise speculation on which horse you are going to buy

> "at the race track, it means a real, it means a substantial doubt and in layman's language, it means the sort of doubt which makes you, in all conscience, say that you cannot feel sure. If you have entertained that type of doubt, then it is your duty to return a verdict of not guilty in relation to the accused person."

The trial judge having given accurate directions on the burden and standard of proof went on to define doubt. In many cases it is quite unnecessary to embark upon this exercise and this is especially so when in all probability counsel on both sides would have explained to the jury the burden and the standard of proof. Old habits die hard and on occasions an experienced judge will resort to ancient phraseology rather than tailor the summing-up to meet the needs of the actual case. However that may be, we find nothing amiss with the directions taken as a whole. A decade or so ago, questions used to be raised as to the adequacy of directions on burden of proof. One would have thought that after the decision in Henry Walters v. The Queen [1960] 13 W.I.R. 354, there would be a quietus to such questions. There the trial judge had directed the jury that:

> "..... a reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other."

The objection to this definition of reasonable doubt was that it introduced a subjective element which could vary from juror to juror having regard to his particular experiences. The Privy Council through Lord Diplock confirmed the view that as each juror must make up his mind individually, differences in temperament might cause one juror to require

more evidence to convince him than another. The Privy Council was emphatic that there was a discretion in the trial judge in trying to assist the jury to understand that they must not convict unless they are sure of the guilt of the accused, to go on to give such analogies as he thought might be helpful. The analogies given in the instant case are the ones most favoured by trial judges in Jamaica and fall squarely within the guidelines of Walters v. The Queen (supra).

It is suggested in Archbold at para. 4-426 of the 42nd Edition that when a judge has given a direction on the burden and standard of proof he ought not to volunteer an explanation of "reasonable doubt." R. v. Gray [1974] 58 Cr. App. R. 177 is an example of a case when the trial judge volunteered an explanation which the Court of Appeal (Criminal Division) considered to convey to the jury too low a standard of proof. We think that in the overwhelming majority of cases, a direction to the jury that the prosecution has the duty to prove the case against the accused to the standard that the jury can feel quite sure of his guilt is a sufficient direction. Infrequently it might be necessary to use the term reasonable doubt and even then, a definition of the term should not be attempted as a matter of course.

Complaint was made as to the nature of the comments of the trial judge upon the unsworn statement of the appellant. Mr. Lorne said that on at least five occasions the trial judge made reference to the fact that the accused made an unsworn statement and submitted that these comments must have left the jury with the impression that the

appellant was hiding from being cross-examined. Two passages from the summing-up were high-lighted and we reproduce them. At page 182 the trial judge was dealing with the question of common design and he interjected:

> "....., if - ... there was a common design to rob, bear in mind the accused says no, that he merely went on that bus in order to travel to Kingston but his testimony has been given from the dock and you will readily understand that having given an unsworn statement from the dock it has not been tested in cross-examination. You will readily appreciate that all the other witnesses who testified under oath were subjected to cross-examination."

At page 200 of the Record the trial judge introduced the contents of the unsworn statement with these comments:

> "I will remind you somewhat quickly of the statement, not because you are not to pay much attention to it, but because you might well agree with my comment that it is a long rambling statement, not altogether relevant to the issues which are before you. It contained some amount of detail; you might recall how he relieved himself during the course of the night."

It is still part of the statute law of Jamaica that an accused person can in his defence make an unsworn statement from the dock. In many parts of the common-law world, the law has been reformed so that the accused may either elect to remain silent in Court or give sworn evidence. A trial judge in the Jamaican situation must explain to the jury that there is a great difference between sworn and unsworn testimony. The decided cases show that in such circumstances

trial judges have a wide discretion to comment on the failure of the accused to give sworn testimony and that provided the jury are not invited to think that guilt might be inferred from such failure to give sworn evidence, an appellate Court will be slow to interfere with the trial judge's discretion - R. v. Bathurst [1968] 2 Q.B. 99; R. v. Mutch [1973] 1 All E.R. 178; R. v. Sparrow [1973] 2 All E.R. 129.

In Sparrow (supra), Lawton L.J. said:

> "..... and when an accused person elects not to give evidence, in most cases but not all, the judge should explain to the jury what the consequences of his absence from the witness box are and if, in his discretion, he thinks that he should do so more than once, he may; but he must keep in mind always his duty to be fair. A T Lawrence J pointed out in R. v. Voisin [1918] 1 KB 531 at 536:
>
> > 'Comments on the evidence which are not misdirections do not by being added together constitute a misdirection'."

A judge who exercises his discretion to comment, may on occasions comment in strong terms. In Sparrow (supra), the Court of Appeal said if the trial judge in that case had not commented in strong terms on the appellant's absence from the witness box he would be failing in his duty as a judge. We think that a similar position would be adopted by this Court if Theobalds J. had not commented and had not shown his disgust at some of the unsavoury details which the appellant had irrelevantly introduced into his fifteen page statement.

On the value of the unsworn statement, the Privy Council gave much needed guidance in Leary Walker v. The Queen [1974] 1 W.L.R. 1090 at p. 1096. As the accused cannot be cross-examined upon his unsworn statement, Lord Salmon said a trial judge could properly pose questions:

> "The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; ..... Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why?"

Lord Salmon also make it explicitly clear that an unsworn statement is not equal to sworn testimony when he said:

> The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it, that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

If a defence is raised in the unsworn statement although it is unsupported by any evidence, that is to say sworn testimony, or documentary evidence, that defence must be left to the jury but the weakness of the supporting fact basis must be high-lighted. The latest judicial indication from the Privy Council of the inappropriateness of the unsworn statement when the accused is setting up a substantial defence appears in Solomon Beckford v. The Queen [1988] A.C. 130; [1987] 3 W.L.R. 611, [1987] 3 All E.R. 425; 85 Cr. App. R. 378. The Privy

Council handed down a threshold decision on the law of self-defence and felt moved to comment thus:

> "Before parting with this appeal there is one further matter upon which their Lordships wish to comment. The appellant chose not to give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the prosecution, that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely upon a statement from the dock; a privilege abolished in this country by section 72 of the Criminal Justice Act 1982. Now that it has been established that self-defence depends upon a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

It is ironic that this Court must heed and abide by the decisions of the Privy Council and yet the profession can ignore the clear advice of the Privy Council and continue, as a matter of course, to tender the defence in the form of an unsworn statement from the dock. We entirely approve of the comments of Theobalds J. at pages 182 and 200 of the Record. We find that his several references to the fact that the defence was by way of an unsworn statement were fair and balanced and in the circumstances entirely appropriate.

There is no merit in the complaint that the witness Karen Pearson was sworn when it was unclear from the voir dire whether she knew the nature of an oath. Karen, 11 years old, attends a Primary School as a pupil in Grade 6(1), knows that the Bible tells about God, knows that if little girls tell lies they will be put in prison and that God will not be pleased with them. The trial judge properly exercised his discretion to cause her to be sworn as in his opinion she understood the necessity to tell the truth and knew the nature of an oath.

We were not impressed by the appellant's complaint that the jury were told that the evidence of Karen Pearson was corroborated by the evidence of Cleveland Bennett on the question of the rape upon the deceased woman committed by the appellant. The fact that there was a discrepancy between the two witnesses as to the exact position of the woman at the time she was being raped could not detract from the fact that both witnesses said she was raped by the appellant from behind. The corroborative evidence was present and in our view quite overwhelming.

We can now turn to the central complaints of the appellant. These were that the learned trial judge did not adequately explain to the jury the law on common design and did not accurately direct them on the effect of continued activities after one co-adventurer had dis-associated himself from an agreed enterprise. The jury were told that manslaughter could not arise on the facts and that their verdict would either be guilty or not of murder. At page 206 of the Record the jury were directed, immediately before retirement, that the main issue in the case for their resolution was whether or not the appellant was acting in concert

with the other three men. After a retirement of fifty-two minutes the jury returned for further directions. Through their foreman they said:

> "I would request Your Honour to give certain further clarification as to the question of common design."

The trial judge obliged. He directed them at pages 208-209 of the Record.

> "The principle of common design involves this: Where two or more persons - in this case that you are trying you have four persons - agree, or join together to commit an offence and that agreement is carried out and the offence committed, then each person who takes an active part in the commission of the offence, is guilty of that offence, and when two or more persons embark upon a joint enterprise - in this case the allegation initially was one of robbery - each person is liable, criminally, for the acts done in pursuance of that joint enterprise including unusual consequences arising from the execution of that enterprise.
>
> If there are unusual consequences such as in this case which did not arise necessarily from a robbery, then each person who takes an active part in those initial enterprises - you remember the initial one was robbery - each person who takes part in the enterprise that goes beyond robbery, is liable criminally for those acts, assuming that they arise out of the common design to rob.
>
> Now, if you are satisfied that there was a common design to rob, that alone would not subscribe to the verdict of murder unless that common design included the use of whatever force was necessary to achieve the robbery objective, or to permit the escape of the felons - that is the people who committed the act, without fear of subsequent identification.

> "So, in the case that you are trying, the Crown is presenting that there may have been initial agreement to rob the passengers on the bus, but in the course of carrying out that, the two deceased persons, their identities were discovered. One was discovered to be a policewoman, and being armed with weapons in order to escape apprehension or detection, it was decided to use force on those two persons. One was a policewoman and one was mistaken to have been a warder. The fact that that may not have been included in the initial agreement or plan to rob, is of no import if it arose spontaneously afterwards on discovery of the identity of those two persons. Then all the parties to that enterprise would be responsible for the criminal act of the one who actually shot the deceased persons.
>
> You have to be satisfied that at some stage the initial agreement to carry out a robbery was extended by a tacit agreement based on the conduct of the parties to resolve or to resort to the use of force. You see, when the police-woman's identity was discovered by the uniform, one of them decided that she should be killed. All of them took part, tacitly, in that agreement. It's a matter for you to find out on the evidence, and if you so find, then this accused man would be guilty of the offence of murder.
>
> The Crown is inviting you to draw an inference that there was this agreement to use force by the presence among the men of weapons which normally one associates with the use of force. If you are going to carry out a robbery, armed with guns, then it is a matter for you to say whether or not it is a reasonable inference that one uses those guns to escape detection or apprehension."

The learned trial judge was obviously endeavouring to direct the jury in conformity with the decision of the Court of Criminal Appeal in Reg. v. Anderson, Reg. v. Morris [1966] 2 Q.B. 110, [1966] 2 All E.R. 644 and Mohan v. R. [1966] 11 W.I.R. 29.

In Mohan's case (supra) the Privy Council held that where one assailant strikes a fatal blow and the other is present aiding and abetting him the prosecution does not have to prove that they were acting in pursuance of a pre-arranged plan. With regard to unusual consequences which flow from a concerted unlawful enterprise, the language adopted by the trial judge follows closely the decision in Reg. v. Anderson, R. v. Morris (supra). At issue in the instant case were the following:

(a) Was the appellant a party to the common design to rob?

(b) Did that common design include the use of force either to kill or to cause serious bodily harm?

(c) When the identities of the two persons killed were discovered, was the appellant a party to their murder?

The prosecution witnesses spoke of a four pronged attack initiated in one swift movement. The driver of the bus spoke graphically of how his head was held back by the appellant and the knife placed at his throat. On all accounts as soon as the woman's identity was proclaimed the appellant went to the part of the bus where she sat. Evidence was led that the appellant took the second turn at raping this woman before she was shot.

In Chan Wing-Sui v. The Queen [1985] 80 Cr. App. R. 117, the Privy Council held that a secondary party is criminally liable for acts of the primary offender if the crime was foreseen by him as a possible incident of the criminal unlawful exercise. In the course of his Judgment Sir Robin Cooke cited with approval the dictum of Mason, Murphy and Wilson JJ. of the High Court of Australia in Johns v. The Queen [1980] 143 C.L.R. that:

> "..... an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture."

Sir Robin Cooke suggested a simple direction which might be applicable in most cases of common design. A jury could be asked:

> "..... did the particular accused contemplate that in carrying out a common unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm?"

On the issue of remoteness Sir Robin Cooke observed that if the party accused knew that the lethal weapons, such as a knife or a loaded gun, were to be carried on a criminal expedition, the defence that the risk contemplated was so remote as not to make that party guilty of murder should succeed only very rarely.

R. v. Slack [1989] 3 W.L.R. 513 is a decision of the Court of Appeal (Criminal Division). Two men agreed to burgle a flat and to rob the occupant. In the absence of the appellant, the other man killed the occupant. At trial the learned judge left two written questions for the determination of the jury.

> 1. Did the accused intend to kill or cause grievous bodily harm to Mrs. M. in the sense that he agreed with E. that in the course of their joint enterprise, Mrs. M. should either be

> killed so eg., that she could not give evidence against them or should be caused grievous bodily harm, eg. so that she could not prevent them robbing her and did she die as a result of such conduct by B.? If so, accused is guilty of murder.
>
> (2) Did the accused contemplate and foresee that B. might kill or cause grievous bodily harm to Mrs. M. as part of their joint enterprise and did she die as a result of such conduct by B? If so, it is open to you to find that he so intended and that he is guilty of murder.

There was no appeal as to the first question. As to the second question it was argued that the trial judge wrongly equated foresight and contemplation with intent. Lord Lane C.J. delivered the judgment of the Court which is summarised in the headnote:

> "..... on a trial for murder in the case of a joint enterprise, proof was necessary that the principal party intended to kill or do serious harm at the time he killed; that, albeit the secondary party was not present at the killing or did not know that the principal party had killed or hoped that he would not kill or do serious injury, nevertheless the secondary party was guilty of murder if, as part of their joint plan, it was understood between them expressly or tacitly that, if necessary, one of them would kill or do serious harm as part of their common enterprise; that the precise form of words used in directing the jury was unimportant provided that it was made clear to them that, for the secondary party to be guilty, he had to be proved to have lent himself to a criminal enterprise involving the infliction, if necessary, of serious harm or death or to have had an express or tacit understanding with the principal party that such harm or death should, if necessary, be inflicted; ....."

The second written question was held to be correct in law as it was made clear therein, to the jury, that the appellant must have at least tacitly agreed that, if necessary, serious harm should be done to Mrs. M. or that he lent himself to the infliction of such harm.

We think that the principles enunciated in R. v. Slack (supra) are those which ought to be applied to the instant case. There are portions of the final directions to the jury after their first period of retirement which are somewhat unclear. The passage at p. 209 where the judge directed that:

> "So, in the case that you are trying, the Crown is presenting that there may have been initial agreement to rob the passengers on the bus, but in the course of carrying out that, the two deceased persons, their identities were discovered. One was discovered to be a policewoman, and being armed with weapons in order to escape apprehension or detection, it was decided to use force on those two persons. One was a policewoman and one was mistaken to have been a warder. The fact that that may not have been included in the initial agreement or plan to rob, is of no import if it arose spontaneously afterwards on discovery of the identity of those two persons. Then all the parties to that enterprise would be responsible for the criminal act of the one who actually shot the deceased persons,"

has been much criticised. One possible interpretation is that the learned trial judge was telling the jury that even if there was no initial agreement to use force in the course of the robbery, because the parties were armed, when they discovered the official capacities of two of the passengers and a decision was taken by one or other of the adventurers to kill the passengers, for this act all the robbers would be responsible in law. This would be casting the net too wide. However, this direction did not stand alone, because

the trial judge went on immediately after to give precise and accurate directions when he said:

> "You have to be satisfied that at some stage the initial agreement to carry out a robbery was extended by a tacit agreement based on the conduct of the parties to resolve or to resort to the use of force. You see, when the policewoman's identity was discovered by the uniform, one of them decided that she should be killed. All of them took part, tacitly, in that agreement. It's a matter for you to find out on the evidence, and if you so find, then this accused man would be guilty of the offence of murder." [Emphasis added]

One sentence in this direction might give the impression that the judge was directing the jury as a matter of law, that all the men were tacitly parties to the murder, but the sense of the entire passage is that the matter was one for the jury and they were being asked to direct their minds to what actually happened after the police-woman's identity was discovered.

In our view the directions on the whole were unduly favourable to the appellant. There was no real basis for truncating the events of that night into an initial armed robbery and a distinct second activity that of the murder of the two passengers. It was a single event and presented the classic features of extreme violence being used in the course of a criminal activity when the official capacities of two witnesses were discovered.

The trial judge might very well have reminded the jury that there was evidence that the appellant was a principal offender in the shooting of the police-woman which would mean that the principle in R. v. Mohan (supra) would be applicable. In any event if the jury believed that the appellant did rape the police-woman they would be bound to absolutely reject his

dissembling tale of being an involuntary participant in the robbery.

The remarks which the appellant attributes to himself as imploring the other men not to kill anyone as they had got the money for which they had come and to "'low the lady" which phrase when expanded would mean "give the lady a chance" can be seen at best as a reluctance on his part to complete the plan rather than as evidence of withdrawal. From the demonstration of the appellant in the dock as to the manner in which the police-woman was raped, the trial judge was moved to express disgust and to comment that even with the passage of time the appellant seemed to be re-living an event in which he participated fully rather than something at which he was a passive by-stander.

It seems to us that on the evidence the only possible verdict was one of guilty of murder. Consequently if we had found the further directions on common design to be unhelpful or misleading we would have been prepared to apply the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act and dismiss the appeal.

We treat the hearing of the application for leave to appeal as the hearing of the appeal and we dismiss the appeal.