JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 106 & 107 /94

COR: THE HON MR. JUSTICE CAREY JA
THE HON MR. JUSTICE GORDON JA
THE HON MR. JUSTICE PATTERSON JA

REGINA v. PETER BLAINE
NEVILLE LEWIS

Dr. Diana Harrison for Applicant Blaine

Paul Ashley for Applicant Lewis

Miss Audrey Clarke for Crown

10th, 11th, 31st July, 1995

GORDON JA

The applicants were convicted in the Home Circuit Court on 14th October 1992 for the murder of Victor Higgs in the course or furtherance of a robbery. This being capital murder was so charged, and each was sentenced to suffer death in the manner authorized by Law.

The case for the prosecution was based on circumstantial evidence and on cautioned statements given by the applicants to the police and admitted in evidence as part of the prosecution case. Mr. Higgs, had been a week-end guest at the Ocean Sands Hotel in the parish of St. Ann. After breakfast on Sunday 18th October 1992

he checked out of the hotel and went to Runaway Bay Golf Club to play in a tournament. He left Runaway Bay in the afternoon and was driving a grey Honda motor car on the main road to Kingston when he encountered a blocked road. He sought advice on an alternate route at the intersection of the main road at Moneague and River Head Road. Both applicants were there and had been there for some time. They offered to direct him along the alternate route through the Alcan Alumina-Bauxite mines to Ewarton where he could regain the main road into Kingston. They entered his car about 4 :00 p.m. and Mr. Higgs drove on to River Head Road. That was the last occasion on which he was seen alive.

On 21st October, 1992 Mr. Higgs' car was found abandoned at Natty Farm Yard near the Alcan red mud lakes in the Ewarton District. This was in the area of the Alcan Alumina Bauxite Mines. The appearance of the car had been altered. The registration plates had been changed and the windows tinted. On the 22nd October, 1992, at about 9:45 a.m. Mr. Higgs' body was seen floating on the mud lakes. The arms of the body were restrained being tied behind at the wrists with a strip of grey cloth. The legs were similarly restrained at the ankle by a strip of grey material similar to that found on the wrists and around the neck, a strip of like material forming a ligature, was tightly wound and knotted on the left side. A length of railway line was bound to the body by barbed wire.

Dr. Royston Clifford, Consultant Forensic Pathologist attached to the Ministry of Security and Justice performed the post-mortem examination on the body. He described the body to be that of a white male 5' 11" tall and weighing

about 190 lbs. The body he found was decomposed. He noted the following injuries:

> (a) A 2.5 cm. and a 2 cm. braided lacerations to the mid and right frontal scalp.
>
> (b) A 3 cm. braided laceration to the left side of the forehead.
>
> (c) Abrasions on the anterior and posterior aspects of the left shoulder as well as on both knees.
>
> (d) Removal of the ligature from around the neck revealed a patterned abrasion about 5 cm. wide encircling the neck. The pattern was the imprint of the cloth ligature.
>
> (e) There were petechial haemorrhages in the palpebral conjunctiva of both eyes i.e small pin point haemorrhages.
>
> (f) Internally there was mild subcutaneous and subgaleal haemorrhages associated with the braided lacerations to the frontal scalp.

The cause of death he attributed to ligature strangulation. Having regard to the size of the victim, he said:

> "It takes a tremendous amount of force to strangle such a male if he is conscious, that means if he is living and if he is not restrained-- because such a person would put up a tremendous defence to try and help himself."

The victim would die within minutes of the application of the ligature. He said he "saw no evidence of injury caused by a lid of a car trunk". "The injuries that I saw was consistent with the ligature cloth, that was tied tightly around" -- This he said in reference to the injury to the neck.

The narrative of the movement of the applicants after they were seen to depart from the Moneague area proceeding along River Head Road in the Honda motor car driven by the deceased is given in a cautioned statement volunteered by the applicant Lewis and admitted without challenge in evidence by the prosecution. This statement was supported by the testimony of Lewis in his defence. There was also admitted in evidence as part of the Crown's case a cautioned statement taken from the applicant Blaine. The admissibility of this statement was challenged but the learned trial judge ruled it was voluntarily given. More will be said of these statements anon.

The strands of circumstantial evidence continued to be spun when at 4:00 clock on the morning of Monday 19th October, 1992, Mr. Higgs' grey Honda motor car was stopped at a police spot check at the six miles in the parish of St. Catherine, some forty miles from Moneague. Four men were in the car, the two applicants and two others, one of whom gave his name as Garfield Solomon. Lewis was the driver of the car and he gave his name to Sgt. Maurice Haughton, the officer in charge of the detail as Michael Stamp of 2 Cedar Valley Road. Garfield Solomon who had an identification card, assured this officer that Stamp spoke the truth. The driver (Lewis) did not produce his licence and had no papers for the motor-car. He informed the sergeant that the papers for the car were with the owner who lived along Red Hills Road in St. Andrew. Two constables were dispatched with the applicant Lewis to locate the owner and the documents. Some 40-45 minutes later the trio returned and reported to Sgt. Haughton that their efforts to arouse the

occupants of premises identified by the applicant had been in vain. The men and the car were searched but nothing incriminating was found and so Sgt. Haughton released them with the car after warning the applicant Lewis to produce his driver's licence and the documents for the motor car within five days.

At 7:30 that morning, the victim's motor car driven by the applicant Lewis with the applicant Blaine and two other men, Gary and Garfield, went to the home of a Michael Benjamin in Arnett Gardens. Called from his home, Benjamin was enlisted by the applicant Lewis to assist in obtaining the services of an expert to tint the glass of the car. Lewis claimed the car was his uncle's. Benjamin entered the car and Lewis drove to the address given by Benjamin where arrangements were made with one Mickey for him to tint the car "midnight tint" for $500.00. Lewis went with the others, purchased the tint, and left the motor car with the expert to have the job done. Later, he took delivery of the car. Tinting had the effect of altering the appearance of the motor car. While the witness Benjamin moved about with the applicant, they went to Stand Pipe in Liguanea (near Cedar Valley Road) and to Gary's home on Gem Road where the applicants fell asleep. The witness observed Lewis providing money for drinks and was puzzled by a remark made by Lewis to Blaine that "If the police hold them, them dey pon them own". This witness said that on the afternoon of the 20th October, 1992, he realised that the applicants and the Honda motor car were gone from the area of Gem Road.

On 11th November, 1992, the applicant Lewis was taken into custody at Salt River in Clarendon by Detective Supt. Garnet Daley and Det. Inspector Kelso Small.

Advised of the charge, he said "Ah the bwoy Peter bait me up. Carry me go to the station let mi tell yuh how it go". Cautioned, he said he wanted Mr. Small to write the statement. Taken to the Lionel Town Police Station, he dictated a statement in the presence of Mr. E.R.Bernard, a Justice of the Peace. When the Crown sought to tender the statement in evidence, Lewis' counsel, Lord Gifford Q.C., advised the court "The statement is fully accepted".

The applicant in the statement said, on the evening of Sunday, 18th October, 1992, he was on the road at Moneague with his friend the co-applicant Peter who had been a visitor in his home for about one week. A white man driving a Honda came and asked directions to Ewarton via the alternate route as the main road was blocked. He was going in the same direction, so he asked the man for a lift. His request granted, he borrowed $100.00 from Wayne Hunter to make up his "liquor money" and he along with Peter went in the back of the car as the passenger seat in front had luggage. They chatted on the way until the driver stopped to facilitate Peter who wanted to urinate. On his return to the car, Peter held up the driver with a knife at his neck. He protested Peter's action to no avail. Peter commanded the driver to open the trunk. Then he took him to the rear of the car put him in the trunk and robbed him of about $600.00. Peter asked this man for his gun and on being assured he would not be killed, the man said it was in a bag on the front passenger's seat. Peter told the applicant to pass the bag to him. This he did and Peter removed the gun. Gun in hand, Peter locked his victim in the trunk and told the applicant to drive. He drove to a point near Faith's Pen. Then he told Peter he

was known in the area and did not wish to be seen. He turned off the main, got lost but later found his way back to the main road. The victim in the trunk started to make noise and knocked on the trunk. Peter told him to retrace his step and return to the by-pass road. This he did. Then he stopped, and asked the next move. Peter said wait until nightfall. At nightfall at Peter's request he opened the trunk. Peter instructed the victim to push out his head and take some fresh air. This was done. Peter, he said, demanded more money from the victim and threatened to shoot him. Lewis said at Peter's request, he took a jacket from the front of the car and gave it to him. Peter cut it in strips and forced one in the victim's mouth as he was shouting for "Murder". Peter then squeezed the trunk lid on the victim's neck and sat on it. Lewis said "the man sound like him was dying." When he heard no more sounds coming from the victim, he tied his hands at Peter's command. Peter then pushed the man into the trunk and closed it.

It was a long statement, the recording of which commenced at 11:25 p.m. and was concluded at 4:00 a.m. the following day. Lewis told of advice he gave as to the disposal of the body and the route he suggested he should drive to avoid detection by the police. He obtained gasolene for the car from a source he knew in Linstead. They then returned to Moneague and collected Gary and Garfield at River Head. He told them the car was stolen. They left for Kingston and on his expressing concern about what he as the driver would do were he to be stopped by the police, Garfield instructed him to use the name of a Customs Officer. Garfield had his custom identification. Stopped by the police, he did as Garfield instructed.

He gave the constables $200.00 of the $300.00 he had. The Sergeant however was not in the scam. He dispatched policemen with him to locate the owner. On the way, he had a further conversation with the policemen and on their return "the sergeant said he did not believe that the car was straight." The officer to whom he had given the $200 spoke to the sergeant and the "Sergeant still said he did not believe me." The officer who accepted the bribe assured the sergeant he knew them and they were sent on their way. They went about, stopping to drink beers and visiting. Peter arranged to have the glass tinted and obtained new registration plates for the car. They slept for a while at Gary's house and in the night, they went to Moneague. He went home changed and they returned in the car to Kingston. Peter slept while he slipped away and went home by bus. He found his home ransacked was informed that the police had visited and he "quickly left the area on foot". He went to the home of relatives in Clarendon and when the police came he decided to tell them all.

Peter Blaine was taken in custody on or about 12th July, 1994. He was identified by Wayne Hunter on an identification parade held on the morning of 21st July, 1994. Later that day, he gave a cautioned statement recorded by Det. Deputy Superintendent of Police Reginald Grant. Objection was taken to the admission in evidence of the statement, on grounds, that it was not voluntarily given but was obtained subsequent to beatings and an inducement held out to him. The issue of admissibility was determined on the voire dire and the statement was admitted.

In this statement Blaine agreed basically with what Lewis said up to their entry in the motor car of the deceased. As the car entered the by-pass road, Blaine said he saw two young men who had visited Lewis' home that morning. On Lewis' request, the victim stopped and these men were taken into the motor car. He said he saw Lewis signal these young men indicating an intention to steal the motor car. On the journey, Lewis asked him if he, Blaine, did not want to urinate. Blaine replied "Yes". Lewis then asked the victim to stop and he obliged. Blaine left the car and so did one of the young men who proceeded to rob the driver at knife point. The victim offered what he had and promised to get more and began to "tremble and we put him fi lie down and John (Lewis) start shake out de bag and a small gun drop out and mi grab it up and John teck it and put it inna him waist. John say, 'Put the man inna de car trunk and mi dweet." Lewis drove on the main road to Faiths Pen but the victim in the trunk made noise so they went back on the lonely road by the mud lake. He said the victim asked for his medication which was located and given to him. Then "we teck him out and tie up him hand and him foot wid de bag strap dem. We decide fi shoot him and John seh him nuh want no blood. De fat youth say, just low de man, nuh kill him', and we sey it better fi kill him fah him wi give we weh fah police ago invalve. We teck off one strap off a di golf bag and put it round him neck and de brown slim youth and me put we foot a him neck and draw the strap and strangle him. When him dead we kinda left him pon spot"

Thereafter a length of iron was obtained, strapped to the body with barbed wire and the body dropped in the mud lake. The money taken from the deceased

was shared. He got about five hundred dollars. They drove towards Kingston and his version of what transpired was similar to Lewis' except, he said Lewis played the major role in getting the motor car tinted and changing the registration plates.

He was arrested in St. Elizabeth and "me go pon one i.d. parade today and two summady (persons) point mi out so me decide fi tell the truth".

In his defence, Lewis testified on oath. His evidence endorsed what he said in his cautioned statement. He said he was coerced to act in the incident as he did because Blaine menaced him. Blaine he said was the person in charge of the operation and he had no part in the act which resulted in the strangulation of the victim. He said he protested Blaines' action from the first hostile act was made against the victim but his protest went unheeded. He drove the car at Blaine's command and at gun point. The gun which he recovered from the victim's bag, Blaine held with the muzzle aimed at him (Lewis) while Blaine instructed him what to do. He saw Blaine bring the trunk lid down on the victim's neck, sit on it until he appeared to be dead. At Blaine's command, he tied the wrist of the deceased and assisted in disposing of the body in the lake. On the journey to Kingston and in their subsequent movements, Blaine was the person in command.

The cross examination of this applicant by Crown counsel was directed to show that he was acting in concert with Blaine in the part he played in the robbery and murder. He did not want to be seen driving the car because he was known and as he did not want to drive on the main road with the victim making a noise in the trunk, he drove off the main . On the main road with persons moving about, the

noise from the trunk was likely to be detected and could lead to a rescue of the victim.. Later, he suggested where the body should be dumped in the mud lake and he assisted in its disposal.

The defence of Peter Blaine was given in a statement from the dock. Again he agreed with what he had said in the caution statement and Lewis' statement and evidence up to the point when Mr. Higgs left the main road at Moneague and drove onto the River road. On this road, he said they saw Lewis' two friends and at Lewis' request, Mr. Higgs stopped and the youths entered the motor car. As Mr. Higgs moved off, one of the youths put a knife at Mr. Higgs' neck. They left the car and began searching him. Mr. Higgs ran off, chased by these youths. Lewis took a bag from the car and joined the chase. Later, Lewis returned to the car and called the applicant "chicken". Thereafter, Lewis drove to Moneague then to Kingston and back to Moneague. He parted company with them then, and left to Ocho Rios, then to St. Elizabeth. He was doing farming in St. Elizabeth when he was held by the police. They asked him for a statement and he said "I gave them the same statement that I have been told".

The first ground of appeal urged by Dr. Harrison on behalf of Peter Blaine challenged the admissibility of the cautioned statement in that "the evidence of the prosecution on the voire dire did not prove beyond reasonable doubt that the statement was free and voluntary".

On the voire dire, suggestions were put to witnesses that the cautioned statement was induced by violence meted out to the applicant and by words. These

suggestions were denied and the applicant did not give evidence in support of these suggestions. Indeed the only challenge he made is that what he said in court in his statement in defence is what he told the police to be recorded in the cautioned statement. This is confirmed by the trial judge in his charge to the jury who said:

> "you will remember that when Blaine gave his unsworn statement he did not say he was beaten or that any promise was held out to him. What he insisted on is what he told the court (is) what he told the police in the statement they took from him."

This view has not been challenged by counsel.

We find that the learned trial judge did not err, but acted correctly in admitting Blaine's cautioned statement. Learned counsel indicated in the course of her submissions that she would not pursue this ground and we agreed with that concession on her part. There is no merit in this ground, it therefore fails.

The second ground filed on behalf of Peter Blaine urged:

> "The learned trial judge failed to bring to the attention of the jury the importance and effect of the medical evidence on Blaine's and Lewis' statements. This was a fatal non direction since an essential part of Lewis' defence amounted to an attack on Blaine."

Dr. Harrison submitted that in the context of this case,the learned trial judge should have assisted the jury by directing their attention to specific portions of the medical evidence which contradicted significant portions of the cautioned statement in so far as they relate to the cause of death.

Neville Lewis in his cautioned statement and in evidence sought to place the blame for the death of the victim on his partner-in-crime, Peter Blaine. His version

of how death was induced was that the lid of the car trunk was brought down on the victim's neck by the applicant Blaine, who thereafter sat on the trunk until all signs of life left the victim. Peter Blaine, in his cautioned statement, said they took a strap from the Golf bag, tied it around the neck of the victim and together with the brown slim youth they placed their "foot a him neck and draw the strap and strangle him."

Dr. Clifford's evidence was that death was due to ligature strangulation. The ligature was the strip of grey cloth tied around the neck which left patterned abrasions around the neck, strips of similar cloth bound the hands and feet. These strips, on the statement and evidence of Lewis, were cut from the jacket of the victim or, more accurately speaking, from the jacket taken from the car of the victim. Dr. Clifford said he saw no evidence of injury caused by the lid of the car trunk. The medical evidence therefore accorded with the statements of the applicants that the deceased was strangled but it differed from the statements in that it asserted that neither the trunk lid nor the golf bag strap was the weapon used but a strip of cloth knotted tightly about the neck.

The jurors thus had the evidence adduced by the Crown in the cautioned statements, and they had the evidence of the Forensic Expert Dr. Clifford as to the cause of death. The applicant Blaine said in his statement from the dock that the deceased fled the scene and disappeared from his sight pursued by three men, one of whom was Lewis. He could only be understood as saying he knew nothing of how the victim come to die; he was not involved in his death. The jury had to

consider this statement which was the essential defence of the applicant Blaine. They had the responsibility to give it such weight as they thought it deserved.

One factor that cannot be overlooked in assessing the evidence is that the cautioned statement of the applicants, the evidence of Neville Lewis, the statement from the dock made by Blaine and the evidence of some witnesses was given in the main, in the Jamaican vernacular. This consists of standard English, broken English, interlaced with patois. This is the language every Jamaican understands. This is a language the jurors ,understand and, with respect which everyone uses from time to time as the occasion demands. It is the language the ordinary man almost always uses. I therefore call to mind the sage advise of Edmund Davies J (as he then was) in **R v. Stokes** (1958) Crim. L.R. 688 "It is not for a judge to tell a jury the meaning of ordinary words in a language which is as much theirs as his". This ground of appeal is wholly without merit.

Dr. Harrison submitted on the third ground argued that the learned trial judge erred in law when he charged the jury that the cautioned statement of Peter Blaine put in evidence as part of the prosecution case was capable of corroborating the evidence of Neville Lewis. She referred us to page 385 where the learned judge said:

> "Now, Neville Lewis has, in the evidence he has given, made damaging accusations against Peter Blaine. I must warn you that Neville Lewis may have some purpose of his own to serve in giving evidence against his co-accused, Peter Blaine. If indeed you were to find that Blaine, on the basis of the evidence you have heard, if you were to find that Blaine participated in the killing of Mr. Higgs, has Neville Lewis minimised his own conduct in the incident he

> has described to you in such graphic detail, and exaggerated that of Peter Blaine because of consideration such as these?
>
> It is right that I warn you that it is dangerous to act on the evidence of Neville Lewis alone in so far as it tends to connect or implicate Peter Blaine to the crime charged unless that evidence is corroborated by other independent evidence." ...
>
> "... If you were to find that a confessional statement was taken from Peter Blaine, the statement admitted in evidence through the witnesses for the prosecution, if you were to find that that statement is true in so far as it affects Blaine, then that is evidence capable of corroborating the evidence of Neville Lewis in so far, at least to the extent that it asserts that Blaine in effect killed the white man, that is to say, Victor Higgs."

The warning given above by the learned trial judge is that which would be given in regard to the evidence of an accomplice. Where however prisoners are charged jointly with the same offence and one gives evidence implicating the other or others then his evidence becomes evidence in the case and no warning is required. In Archbold Criminal Pleading 1992, the learned author states the principle at paragraph 15 - 315 thus:

> "If a defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant: R. v. Rudd, ante. The judge in his discretion may think it proper to warn the jury that a co-defendant may have some purpose of his own to serve in giving evidence and that accordingly it would be dangerous to act on his uncorroborated evidence: R. v. Prater (1960) 44 Cr.App. R. 83, C.A.; R. v. Stannard and others (1964) 48 Cr. App.R. 81, C.A. (R. v. Prater, ante, explained."

We accept this view as correctly stating the law. The learned trial judge perhaps out of an abundance of caution gave the warning. It was favourable to the prisoner Blaine and did no injustice. The statement of the applicant Blaine on admission becomes evidence against him only in the case on which the jury can act without the need for corroboration. This ground also fails.

The fourth ground filed on behalf of Blaine corresponded with that urged on behalf of Lewis. It is stated thus:

> (a) The learned trial judge omitted to direct the jurors that they can only convict of capital murder. The accused person who they find actually committed the act, that is by his own act caused the death of, or inflicted , or attempted to inflict grievous bodily harm, or who himself used violence on the deceased and such non direction amounted to a misdirection; or
>
> (b) The learned trial judge was under a duty to assist the jury in ascertaining if anyone of the two appellants could be identified as the one who did the decisive act and the evidence to indicate such, and to direct the jury to find one of the two appellants guilty of capital murder, and if not possible to find one of the applicants guilty of capital murder or anyone of two then they both should be found guilty of murder. The learned trial judge failed to give any guidance in that area and that omission amounted to a misdirection.

On behalf of Neville Lewis the complaint was that "the learned trial judge erred in law by failing to direct the jury adequately in accordance with section 2 (2) of the Offences Against the Person (Amendment) Act 1992." We deal with both at this time.

The Offences against the Person (Amendment) Act 1992 (The Act) promulgated on 13th October, 1992, created the offence of capital murder in Section 2. Different categories of capital murder were created thus:

> "2.(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say -
>
> ...
>
> (d) any murder committed by a person in the course or furtherance of -
>
> (i) robbery;
>
> (ii) burglary or housebreaking;
>
> (iii) arson in relation to a dwelling house; or
>
> (iv) any sexual offence
>
> ...
>
> 2.(2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it." (emphasis supplied)

The common law principle of guilt on the basis of common design of persons acting in concert is thus preserved in respect of the crime of murder but for the crime to amount to capital murder the crown must prove that the prisoner:

(a) caused the death or

(b) inflicted or

(c) attempted to inflict grievous bodily harm on the person murdered , or

(d) himself used violence on the person murdered in the course or furtherance of an attack on that person.

The section plainly excludes from the scope of capital murder a "look out man" in a common enterprise. All who therefore display violence to the person killed in the course or furtherance of any crime specified in section 2 (1) (d) (supra) could be convicted of capital murder if and only if the violence comes within the categories (a) to (d) above. Robbery is a crime which involves the use of, or the display of violence and the evidence in the case if accepted by the jury proved that the hapless victim, Mr. Victor Higgs, was robbed and violently executed. The dictionary meaning of violence is "the unlawful exercise of physical force, specifically, an act calculated to intimidate by causing fear or personal injury". Mr. Higgs was robbed of money and his motor car. The question the jury had to decidee was whether personal violence was used on him in furtherance of the robbery. The statement and evidence of the applicant Lewis sought to exclude him from any show of violence and to excuse whatever he did that could be regarded as visiting violence on Mr. Higgs on the ground that he was coerced by force to do it. At the same time this applicant in his evidence placed all blame for what was done in the applicant Blaine. In the jury's assessment of the evidence there is scope for inferences to be drawn from circumstantial evidence. The applicant Lewis when he was leaving Moneague that fateful Sunday was so short of cash he borrowed

$100.00 from Wayne Hunter. They stopped on the journey to Kingston and bought gasolene and at the police check he said he paid $200.00 of $300.00 to a policeman. Michael Benjamin later that day saw him spending somewhat freely on material for tinting the car windows. Where did he get funds if not from the proceeds of the robbery. He said he disassociated himself from all acts of violence committed by Blaine. Would Blaine in those circumstances have shared the spoils with him? Neville Lewis drove the car with the hapless Mr. Higgs imprisoned in the trunk alive and kicking. He avoided Faiths Pen and the main road where the noise the prisoner in the trunk was making may have led to discovery of their ill deeds. The act of imprisonment and moving about with Mr. Higgs so confined in a cramped space must amount to the use of violence and Lewis cannot but bear blame for it. On Lewis' statement Mr. Higgs was in the trunk of the car when Blaine demanded money from him. Lewis said Mr. Higgs invited Blaine to push his hand in his pocket and remove money therefrom. Blaine obliged. The question arises why did Mr. Higgs not perform that task himself? was it because in his situaion he could not because his hands were bound? On Lewis' statement and evidence there was nothing to prevent Mr. Higgs from fetching out the money. Lewis said he bound the hands of Mr. Higgs after he was killed. The jury had these matters raised to consider. They also had the evidence of Dr. Clifford that unless restrained Higgs would have mounted tremendous resistance to ligature strangulation. The jury had it on Blaine's statement that he was assisted in the application of the ligature. Findings of fact and inferences from facts found are for the jury's determination. When the

factors adumbrated above are examined with the remark made by Neville Lewis to Peter Blaine viz " ef the police hold them, them on dem own" the jury were entitled to find that the applicants acting in concert used violence on Victor Higgs and in the course or furtherance of robbery. And that violence by its nature resulted in the death of Victor Higgs.

The directions that the learned trial judge gave the jury on this issue of capital murder are at pages 397, 398 and 399 of the transcript:

> "Members of the jury, if you were to be satisfied, feel sure about it that both accused men jointly attacked the deceased and each intending to kill him or to inflict on him really serious bodily harm and the combined effect of what they did was to kill him by their joint act of using a ligature cloth to strangle him, then in those circumstances they would be the actual killers and it would be open to you to say that they are guilty of murder. If at the same time you are equally satisfied and feel sure about it that they killed the deceased in the course of or in the furtherance by them of a robbery and that each of them used violence on Victor Higgs in the course or furtherance of an attack on him, then it would be open to you to say that each accused man is guilty of capital murder.
>
> The prosecution say that Higgs was killed during the course of a robbery and you must say whether there was killing - the killing of Higgs - in the course of a robbery. There is evidence upon which you can act that Higgs was robbed, money taken away from him by the application of force of a quantity of money according to Lewis some six hundred dollars ($600.00), that his gun was taken from him, the application of force and that his car was stolen in violent fashion. If you are sure about it, that these two accused men acting together killed Victor Higgs in the course of a robbery of his money, gun and a car, then as I say it would be open to you to convict each of capital murder provided, of course, that you feel sure about it that each used violence

> on Victor Higgs or attempted to do so in the course of an attack on him. If the prosecution fails to make you feel sure that violence was not (sic) used on Mr. Higgs, by one or other accused, but that that accused who used no violence on him, aided and abetted the other, in the commission of the offence of murder, then you would not return a verdict of capital murder against such a person who did not use violence or attempt to do so, whilst committing the offence of murder by way of aiding and abetting the actual killer.
>
> Members of the jury, I have dealt with both accused and I have asked you to give separate consideration to the position of each accused. It is for you to say, in your own time, whether or not, having regard to the evidence in the case, you find the accused, Neville Lewis or the accused, Peter Blaine, or both of them, guilty of capital murder.
>
> If you find Neville Lewis not guilty of capital murder, you will be asked to say whether or not you find him guilty of murder. Likewise, if you find Peter Blaine not guilty of capital murder, you will be asked to say whether or not you find him guilty of murder."

These directions were, in our view, adequate to ensure that the jury appreciated the distinction between capital and non capital murder and their responsibility to determine on the evidence adduced the verdict they should return. This ground of appeal fails.

We now turn to examine the grounds of appeal of the applicant Lewis. In his directions to the jury the learned trial judge directed their attention to the actions of Lewis as given by him in evidence.

> (a) he gave to Blaine the jacket from which the ligature was cut after he failed in his attempt to tear it;

(b) he decided not to drive through Faiths Pen with Higgs still alive in the trunk;

(c) he drove Higgs to the place of execution;

(d) he decided on the disposal of the body;

(e) he decided to bypass the Ewarton police station.

Then he instructed the jury:

"... is that conduct from which you could say that he gave assistance, on his story, to Blaine before and at the time he said Higgs was killed?

He tells you on his own behalf that there would be no basis for you to say that he intended to give assistance to or encourage Blaine, because his evidence is that he pleaded with Blaine and begged him not to do Higgs any harm.

As I say, members of the jury, you have to examine his conduct, because it is from conduct that you are able to determine whether you can infer intention in coming to a conclusion from not just what a man say but also what he does, and you will recall that there is evidence from him that he asked Blaine what he was going to do. Is that, together with other circumstances, evidence of an intention on Lewis' part to render assistance? Of course, members of the jury, if you conclude that he had no intention to give assistance or encouragement, or you are not sure whether he had intention to give assistance or encouragement, then you would have to say that he was not there aiding and abetting.

Again, members of the jury, if he only gave assistance to the actual killer, if that is what you find, after the deceased was killed, when the killer was no longer in the course of the commission of the offence, then in those circumstances Lewis' conduct wouldn't amount to aiding and abetting, and so he would not be guilty of murder if that be the case."

Mr. Ashley relied on these passages in support of his second ground of appeal complaining that the trial judge erred by misdirecting the jury to consider these decisions made by the applicant Lewis as part of the conduct of assistance before and at the time of the killing.

We find that the passages do not render the support contended. The directions on ading and abetting were clearly given and the jury could not have been led into error. There is no merit in this ground.

On Lewis' statement and his evidence there were given ample indications of occasions on which he could, if he so desired, withdraw from the association he had with Blaine. He never seized any of the oportunities he had but contented himself by saying he was under duress and that accounted for his actions. It is trite law that duress does not avail a person charged with murder with a defence and the jury were appropriately directed. Here there was no error made by the learned trial judge and Mr. Ashley's submission in that vein is unsupportable.

The final ground submitted on behalf of Lewis was that the learned trial judge misrepresented the evidence of the defendant, Neville Lewis to the jury when he stated inter alia:

> "He says he was held at gun point and he gave that as a reason for acting the way he did, getting the bag, taking up the jacket."

The bag that Lewis took from the motor car and gave to Blaine contained Victor Higgs' gun. This gun was taken from the bag by Blaine and it was while he had it in his possession that he instructed Lewis to give him the jacket. The judges review of

the evidence in this detail was erroneous, however, as Mr. Ashley readily and spontaneously conceded:

> "defendants case was that he acted under duress at some point in time. I admit frankly that gven the weight of evidence the error would not have affected the case -- it could not be fatal."

The evidence detailing these incidents came from Neville Lewis and at the time he was instructed to pass the bag to Blaine, Blaine was armed with a knife. The very knife that was used initially by him in the assault on Victor Higgs. We agree that this error of the learned trial judge was of no effect given the plethora of evidence amassed by the prosecution against the applicants. We would, if we considered it necessary, apply the proviso to Section 14 of the Judicature (Appelate) Jurisdiction Act.

We are of the view that the Crown has established an insurmountable case of murder and the evidence supporting the charge of capital murder as defined in the Act is indeed very strong. The jury were given clear and fair directions by the learned trial judge who held the scales and presented the defence of each applicant in a balanced summation. The applications for leave to appeal are refused.