**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO: 104 AND 105 OF 1998**

**BEFORE: THE HON. MR. JUSTICE FORTE, P.**
**THE HON. MR. JUSTICE BINGHAM, J.A.**
**THE HON. MR. JUSTICE HARRISON, J.A.**

**MICHAEL REID**
**STEVE BROWN V R**

**Arthur Kitchin for Steve Brown**

**Lynden Wellesley for Michael Reid**

**Paula Llewellyn, Acting Senior Deputy Director of Public Prosecutions and Tanya Lobban for the Crown**

**November 28, 29, 2000 and July 31, 2001**

**BINGHAM, J.A:**

On October 17 1998, in the Home Circuit Court, Kingston, the applicants were convicted of the non-capital murder of Winston O'Connor committed on 17th July 1991, in the parish of Saint Catherine. They were each sentenced to imprisonment for life. The learned trial judge also ordered that they should not become eligible for parole before serving a period of seventeen years.

Their applications for leave to appeal having been considered and refused by the single judge, this application was renewed before us. Having heard the submissions of counsel we refused the applications, affirmed the

convictions and sentences and ordered that the sentences were to commence from 17th January 1999. We promised then to put our reasons into writing and this we now do.

## The Facts

In the early morning of Saturday, 6th July 1991, the deceased Winston O'Connor, along with his wife and children were asleep in their dwelling house at Russell Pen, Treadways, Linstead, St. Catherine. Mrs O'Connor awoke about 2:00 a.m. and saw the deceased in the act of closing the door between the bedroom and the living room. After doing so, he was then seen in the act of closing the door between the children's bedroom and the living room. She then observed a man standing in the children's room with a flashlight shining towards her bedroom. She also noticed that her husband (the deceased) was now struggling with two other men. She then heard several explosions and saw her husband fall to the floor. A man dressed in a frock and holding a gun in his hand then grabbed her gold chain from off her neck. He demanded money. She attempted to escape but another man held a knife at her neck and also demanded money from her. She gave him some money that was in her husband's attache' case. The men then left the premises. Apart from her chain and the money, the men also removed a Gold Star radio, a tape deck amplifier and a video from the home. She also missed her husband's watch and his wallet. Given the prevailing circumstances, and the sudden nature of the encounter, Mrs O'Connor was unable to identify any of the intruders.

Her husband who lay mortally wounded suffering from gunshot injuries was rushed to the Linstead Public Hospital, and then later transferred to the Kingston Public Hospital. Efforts to save his life were not successful and he succumbed to his injuries on 17th July 1991.

Following the incident on July 6 and later that day the Linstead Police visited the premises and made certain observations and commenced investigations into offences of shooting with intent, burglary and robbery with aggravation. Then following the death of Mr O'Connor on the 17th July, the investigations were elevated for enquiries into an offence of Murder.

On 23rd July 1991, a post mortem examination was performed on the body of Winston O'Connor by Dr Memory Stennett. The body identified to the doctor by Mrs Sharon O'Connor. Dr Stennett testified that on an external examination of the body, she found a surgical opening in the wind pipe which was made by a surgeon in an attempt to save the life of the deceased. On further examination she found three gunshot wounds. The first was on the front of the neck. It was five centimetres below the thyroid cartilage. This wound measured one centimetre in diameter. The second wound was to the back of the neck, eight centimetres below the occipital area. This wound was partially healed and 0.3 centimetre in diameter and irregular in shape. The third wound was just below the left kneecap, one centimetre in diameter and circular.

On dissection of the body she saw a swelling of the brain. Pus had collected in an area beneath the covering of the brain. On dissection of the neck there was injury to the soft tissues with a fracture to the fifth cervical

vertebrae or backbone. The spinal cord in this area was necrotic, that is consisted of dead tissues. There was a five centimetres abscess behind the upper oesophagus. The bronchial tubes were red in appearance. Both lungs showed signs of bronchopneumonia. On examination of the extremities there was a ten centimetres area of haemorrhage in the soft tissues in the inner aspect of the left thigh located sixteen centimetres above the knee and a bullet was identified just below the skin. In the doctor's opinion, death was due to a bullet wound to the neck complicated by multiple sites of infection.

On 4th August 1991, a party of policemen headed by Superintendent Lester Howell, acting on information went to Middlesex district in Saint Ann. They went first to the home of the applicant Michael Reid, who they knew before. He was seen in a bedroom to the rear of the premises lying on a bed. He was informed of the purpose of the visit by the police. He was seen with a gold chain. When questioned as to where he got the chain from he said that:

> "it was over four years now that he have dis chain."

Before making the enquiry of Reid about the chain, he had been asked what his name was. To this he replied that it was Everton Mattis. On closer examination, the chain was seen to have attached to it, a gold ring which was broken. The chain matched the description of that taken from the neck of Mrs O'Connor on the night of the incident at her home.

On 6th September 1991, Mrs O'Connor acting on a report went to the Linstead Police Station. There she identified the gold chain as hers in the presence of the applicant Michael Reid. When the chain was identified, Reid

denied taking it from the O'Connor's house. He said that he had the chain for four years.

One Alburn Angus testified that the applicant Steve Brown was his nephew and also goes by the name "pusie." He also said that he knew the other applicant, Michael Reid who is called "Mike." He recalled seeing Reid on a Sunday night sometime in July 1991. Reid came to his home sometime around 1:00 o'clock in the morning. He had a radio with him. He asked Reid "where he had got the radio from?" He said that "his uncle had given it to him." He also asked Reid "where he had been the night before?" He did not answer him. Reid left the house the following day leaving the radio behind. Mrs O'Connor on her visit to the Linstead Police Station also identified the radio as the one missing from her house.

The learned trial judge in her summation gave clear directions to the jury on the law relating to recent possession. This doctrine was relied on by the Crown, in an attempt to link some articles, which were treated as property stolen from the O'Connor's home at the time of the murder, with the articles taken from Mr Angus' residence and the gold chain found in the possession of the applicant Reid. The manner in which the learned judge approached her task on this aspect of the evidence will be considered later on in this judgment.

Later on 4th August 1991, while in the parish of Saint Ann, Superintendent Howell saw another police party with the applicant Steve Brown. He told Brown of the report of the murder of Mr O'Connor and that he was involved. Brown denied having any knowledge of it.

On 8th August 1991, accompanied by Detective Inspector Smith, Superintendent Howell proceeded to the Linstead Police Station where he sent for Steve Brown. He cautioned him and told him that he had further information that he was present at the scene of the crime. Brown began to relate a story to him as to how the offence was committed and with whom he had gone. He then asked Brown as to whether he wished to have what he told him put into writing in the form of a statement and Brown said, "yes." He further enquired from Brown as to whether he wanted a relative or a friend to be present. Brown then said, "he did not want them to know what had happened." He was also asked whether he wished an attorney to be present and Brown said "no." He was further asked whether "he wanted to write the statement or he wanted someone to write it for him." He asked Superintendent Howell to write it as he could not write. Following the statutory caution and the request for the statement to be written (which was signed by Brown and witnessed by Inspector Smith), Brown then dictated a statement which was taken down in writing by Superintendent Howell. When he was finished, the statement was read back to Brown who signed it as true and correct and it was witnessed by Inspector Smith.

The evidence of Superintendent Howell as to the circumstances of the taking of the statement from Brown was supported by the account given by Inspector Smith.

On 15th August 1991, Superintendent Lester Howell served a copy of the statement taken from Brown on the applicant Reid and told him to read it. Having done so, Reid then said that he wanted to give a written

statement. Superintendent Howell took Reid to Inspector Merval Smith and spoke to him. He then left the two of them together. Later that day around noon, Inspector Smith took Reid to Superintendent Howell's office and summoned Sergeant Winston Walker. Superintendent Howell joined them shortly after and spoke to them in Reid's presence and hearing. They then left with Reid to Sergeant Walker's office. Reid then started to relate a story but was asked as to whether he wanted to write his statement or whether he wanted someone to write it for him. He said that he wanted Inspector Smith to write the statement.

Inspector Smith then obtained some blank sheets of foolscap paper and wrote out the statutory caution and on Reid's request read it over and explained it to him and requested him to sign it. He did so. His signature was witnessed by Sergeant Walker.

Reid then dictated a statement to Inspector Smith which he recorded in the applicant's own words. When Reid was finished, the statement was read over to him and he was requested to alter, add or correct, anything in the statement. Reid said he did not so wish, and then was requested to sign his name; and he did so. His signature was witnessed by Sergeant Walker. Only Sergeant Walker was with him in the room at the time of the taking of the statement. Inspector Smith said that no force, threats, or any inducement was held out to Reid to make him say anything and what he said was done of his own free will.

As the cautioned statements made by each applicant formed the very foundation of the Crown's case, it is now necessary to look at what each applicant said.

The statement of Reid was admitted and read into evidence after a challenge by the defence as to its admissibility on the basis that he was beaten and forced to sign it.

As to the applicant Michael Reid, the voluntariness of his statement taken by Inspector Merval Smith and witnessed by Sergeant Winston Walker was challenged as to its admissibility by counsel for Reid suggesting that he also was beaten and forced to sign the statement.

**The Statement taken from Steve Brown**

> "At Linstead Police Station this 8th day of August 1991, at 1:20 p.m. You Steve Brown cautioned as follows:
>
> You are not obligated to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.
> Sgd: Steve Brown 8.8.91
> Witnessed by M.C. Smith Det. Corp. No. 6012, 8th August 1991."
>
> "I Steve Brown wish to make a statement. I want some to write down what I say. I have been told that I need not say anything unless I wish to do so, and whatever I say will be taken down in writing and may be given in evidence.
> Sgd: Steve Brown 8.8.91
> Witnessed M.C. Smith Det. Corp. No. 6012 8th August 1991."
>
> Steve Brown said:
>
> "Yes sir, really and truly I go with Mickey and two other men one a dem name Saudie but the other man through is not a area man me num know him name. Dem come a mi yard the Friday night with

them gun, the three a dem. Mickey have the gun. Dem come deh bout 11:30 to 12:00 o'clock so dem order mi fi come show dem di way. Dem tell me say dem a come a Linstead but dem want fi travel through the bush the short cut. Dem say mi fi come show dem di way or dem ago bun down mi house. We left mi yard. When we catch part way pon de road through the bush mi Mickey put on one frock whey him did have underneath him arm. We come through de bush and come a Linstead. We go up a de taxi man yard. Mickey lead the way. Mi know de man but me no know him name but me drive in a him motor already. When we reach the taxi man yard everybody did a sleep. Mickey knock the door but nobody no answer so Mickey tear off one a de side window near the door a de kitchen. When him tear off the window him give Saudi his gun and push Saudie in through the window. After Saudie go in Saudie pull the door and him and Mickey go in and left me and the stranger guy outside. Dem wake up (the) de man and ask him fe money and thing, then dem take a tape (I showed the cassette tape recorder to the maker and asked, "Is this the tape?" and replied "Yes man, that is the tape and one more something, me no know de name, it flat and holey holey. Them get money to but me no know how that go. Oh, dem take a chain to and him suppose to have it for when him come out him have the chain in a him hand. Me saw him a wear the chain after dat. Me hear three shot fire in a de house and about fifteen minutes after that me see Saudie and Mickey back back out a de man room. Saudie have the tape and Mickey have the video and the gun. After we come out a de yard all a we start run go back the same way whey we come from. When we reach back a Saudie yard at Benbow district through a nuff things me seem them with some one dollar and two dollar. Me get twenty-four dollars. Mickey keep the tape and the chain but me no know who keep the tape and the chain but me no know who keep the video. Couple day after Mickey say him a go sell the tape to a man name Brothers. Mi check say him sell the tape. Sometime after him tell me she the man dead. When we left the taxi man yard Mickey still have on the frock and when him ketch a Saudie yard him take off the frock Him did have on one ganzie

business over his head. Me gone yah so. Me no know nothing more.
Sgd: Steve Brown 8.8.91
M.C. Smith Det. Corp. No. 6012 8th August 1991.

The above statement was read over to me. I have been told that I could add, alter or correct, any part I wish. The statement is true and I have made it of my own free will.
Sgd: Steve Brown 8.8.91.
Witness M.C. Smith Det. Corp. No 6012 8th August 1991.
Taken by me this 8th August 1991, at Linstead Police Station in the presence of Det. Corp. Merval Smith.

The statement commenced 1:20 p.m. and concluded 2:30 p.m. The statement was read over to its maker who signed as correct. He gave the statement without coercion. He was not assaulted nor was he threatened. He made it of his own free will
Sgd: G. Howell,
Asst. Supt. 8.8.91

**The Statement taken from Michael Reid**

"12:10 p.m. 15th August 1991, at Homicide Office, (C.I.B.) Headquarters, in the parish of Kingston."

Present: Michael Reid and Sgt. Walker, W.H.
Michael Reid was cautioned by Detective Corporal M.C. Smith as follows:

"Do you wish to say anything?"

"You are not obligated to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."
Sgd: Michael Reid 15.8.91
Witnessed Sgd: Detective Walker 15.8.91.

"I Michael Reid wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and whatever I say may be given in evidence."
Sgd: Michael Reid 15.8.91

Sgd: Detective Walker 15.8.91

"Boss Saudi dem tell me say dem a go pon a works down a Treadways and them want me come with dem. Dem did check me from a week before. Saudi show me a gun and tell me say him bredda name Peng and him friend tek it from one chiney man from Treadways. Dem tek the gun from him a Gayle. So Friday night me did a come from Linstead and stop up a Saudi yard. Saudi tell me must come back come check him little more because him a go pon the works later. Me and Tussie go check Saudi up a him yard later in a the said Friday night. When me go up a Saudi him and him two friend start tell me say me must come with dem pon di works and if me no come with him him a go rub me because we a go bleed pon dem because we come from Treadways and if anything, we a go bleed pon dem.

Me go wid dem and Tussie goh to. Saudi lead the way and den Tussie take up the way to weh him know. All the way Saudi have di gun. Him noh put it in a mi hand because no trust me. When we reach pon di spot Saudi go go spot out up a di yard and Tussie feel de window and find say it no lock, because a kitchen window. Saudi climbed up and go through the window, pull a lock and let in three a we, me and him two friend when we go in we start pack up some things because the people dem did a sleep. Saudi tek the things and gi fi him friend dem fi put out a door. Him tek up the video and the tape alone. Den him go in a the man bedroom and me stand up back a dem. Saudi tek up the man watch and billfold and put dem deh in a him pocket. Den me hear him fire one shot and the man wake up. Said time same time me hear some more shot fire and the man drop a ground. Him and the man start 'rassle.' After him fire the fuss shot den a dat time me hear the balance a shot dem fire. Same time di lady dat a di man woman get up and Saudi sey to her say, 'gi me di money' and the woman throw a brown pouch business pon di ground and same time me tek it up and Saudi tek it way from me. After him tek it from me same time him say come gwaan and we come out a di house.

> Saudi friend, the fat one, tek up the video and the next one tek up the tape and we left same time. From de shot dem fire we nuh tan nuh long time. We leave and go back weh we a come from through the same place we walk come down.
>
> After we reach a Saudi yard now, Saudi ask me fe count di money. When de money count Saudi give me a part of di money fi me and Tussie and gi we the tape and sey dem a keep the video. After dat me and Tussie go down a we yard. Dat a it man."
> Sgd: Michael Reid 15.8.91
> Witness Sgd: Detective Sgt. Walker 15.8.91
>
> "The above statement was read over to me and I have been told that I could add, alter, or correct, anything I wish. The statement is true and I have made it of my own free will."
> Sgd: Michael Reid 15.8.91
> Witnessed Sgd: Detective Sergeant Walker
>
> "Taken by me this 15th day of August, 1991, at the Homicide Office (C.I.B.) Headquarters, in the presence of Detective Sergeant Winston Walker."
>
> "The statement commenced at 12:10 p.m. and concluded at 2:00 p.m. The statement was read over to its maker who signed as true and correct. He gives the statement of his own free will. He was not assaulted or threatened, he was not offered any favour."
> Sgd: M.C. Smith, Detective Corporal 15.8.91

Detective Corporal Smith and Detective Sergeant Walker also gave evidence supporting the circumstances in which the statements were taken from the applicants, Brown and Reid.

The Crown's case against the applicant Michael Reid did not rest entirely on the contents of the cautioned statement made by him. The prosecution also sought to link the applicant Reid to the incident at the O'Connor's home on the night of 7th July 1991, through the gold chain taken

from the neck of Mrs O'Connor by one of the assailants as also through the testimony of Mr. Alburn Angus.

Mr. Angus testified that Reid took a radio to his home sometime in July 1991 and left it there. This radio was subsequently identified by Mrs O'Connor as her property and the one taken from her home on the night that the home was invaded, property stolen and her husband shot and killed. She also identified the chain taken by the police from Reid to be the one which was taken from her on the night of the incident.

In dealing with this evidence and the law as it relates to the doctrine of recent possession, the learned trial judge said:

> "Now it is also the prosecution's case that a number of items had been stolen from the O'Connor's residence and the prosecution is alleging that these were found in the possession of the accused, Reid.
>
> Now where good are stolen and are found in the possession of a person recently after stealing, subject to any explanation which he offers, you may infer that he came by those good dishonestly.
>
> Now the crown says that a radio and a tape recorder and a gold chain, which Mrs O'Connor stated was taken from her house on the night of the incident, were stolen. These items were alleged to have been in Reid's possession after the incident.
>
> In the circumstances, a doctrine which we refer to in law as Recent Possession is applicable here. In order for you to apply this doctrine, the prosecution must satisfy you that Mrs O'Connor's house had been broken into on the night of the incident.
>
> It must also be shown that the goods which Mrs O'Connor said were taken from her house were in fact stolen and these goods were recently stolen.

> It should also be (sic) establish that they were in the possession recently of the accused man, Reid.
>
> It is for the prosecution also to satisfy you as to whether or not the explanation given by Reid is true or untrue."

No complaint was leveled by learned counsel for the applicant Reid regarding these directions on recent possession. We also, regard them as proper.

**The defence of Michael Reid**

The applicant Michael Reid when called upon elected to give sworn evidence. In his evidence he said that he lives in Freetown, Clarendon, and that on 3rd August 1991, he was taken to Middlesex, St. Ann, by his brother. On the 4th August 1991, while he was asleep at the home of his brother's friend, he was awakened by Everton Mitchell. Mitchell opened a door. He then saw Superintendent Howell and a number of policemen including Detective Corporal Merval Smith. Detective Corporal Smith spoke to him and he was then taken from the premises by Superintendent Howell. He recalled being transported by the police to Linstead Police Station and then transferred to Central Police Station in Kingston where he was placed in custody. He denied that while in custody at this station a cautioned statement signed by Steve Brown was served on him and that he spoke to Superintendent Howell and volunteered to give a statement under caution. Reid also denied giving a statement under caution to Detective Inspector Smith in the presence and hearing of Detective Sergeant Walker at the Central Police Station on 15th August 1991, and signing that statement in several places on sheets of foolscap paper. He recalled being questioned by Detective Superintendent Howell, Inspector Smith and Detective Sergeant

Walker and being threatened by them with physical harm when a big book in the C.I.B. office where he was being questioned was held over his head. He denied knowing Steve Brown and going with Brown and others to the home of the O'Connors on the night of 7th July 1991, and shooting the deceased. He said he did not know the witness Mr. Angus and he never visited his home on two occasions or took any 8 track tape deck there and left it.

**The Defence of Steve Brown**

The applicant Steve Brown also gave evidence on oath. He recalled 8th August 1991. He was being held in custody at the Linstead Police Station. He was taken from his cell by a Mr. Lee to his office where he saw Superintendent Lester Howell and Detective Inspector Merval Smith. He told them that he knew nothing about the murder. Mr. Smith and Mr. Lee told him he is a liar. They told him to sign his name to a document. He told them that he could not read. Mr. Lee proceeded to beat him with a piece of rubber all over his body and in his face for over an hour. His fingers were swollen and he had cuts over his face and other parts of his body as a result of the blows. A gun was placed at his ears and he was threatened. He was then placed in the trunk of a car for over two hours resulting in him being nearly suffocated. He eventually was forced to sign a statement. He did so under duress. He did not dictate any statement to the police. No statement was read over to him. He denied being called Tussie, the name given to him by Mr. Angus, his uncle, or knowing the applicant Reid before 8th August 1991, when he saw him for the first time at the Linstead Police Station. He recalled that on 9th July 1991, he was at a dance at Guys Hill from 9:30 p.m.

to around 2:00 o'clock the following morning. He was not on the scene of the crime when it was committed.

**The Submissions – Michael Reid**

Learned counsel for the applicant Reid, sought and obtained leave to argue four supplementary grounds of complaint. Of these, only Ground 1 was advanced in argument.

**Ground 1**

The complaint here was that the learned trial judge failed to direct the jury adequately on the law relating to Common Design. In her directions in this regard, having referred to the joint charge preferred against each applicant, the learned judge said:

> "Now here are two accused jointly charged with the offence. It is not necessary in order to secure a conviction of each, to prove that each was acting in concert with each other and accordingly, it is open to you to convict each of committing the offence independently of the other."

Then came the following directions:

> "Now, the Prosecution is saying that several men had gone to Mr. O'Connor's house on the night of the incident. Now, where two or more persons embarked on a joint enterprise, each is crucially liable for the acts (sic) down in the pursuance of that enterprise. This is so because of the doctrine in law which we refer to as Common Design. Now if two or more persons agree or join together to commit an offence and that agreement is carried out and the offence is committed, then each person who takes an active part in the commission of the offence is guilty of the offence. Such persons cannot be convicted of the full offence unless he is present at the commission of the offence and actively abetted and assisted and aided in its commission."

Although on the evidence adduced by the prosecution there is no evidence establishing the identity of the persons who shot and killed the deceased from the caution statement of the applicants, each admitted viz, to being amongst the persons who went to the deceased's home on the night in question; that one of the party had a gun; and that they each participated in breaking into the premises and taking part in the robbery and the killing of the deceased. Based on the doctrine of Common Design both would be jointly responsible for the murder. This would be so for reason that not only would they have been part of the agreement to break into the dwelling house and to steal property belonging to the occupants, but, it was to be expected that any resistance to their joint efforts would be overcome by the use of force -even to the extent of the application of violence to achieve their objectives.

When examined against this background, the directions given by the learned trial judge were proper and cannot be faulted. We find no merit in this ground of complaint.

**Steve Brown**

Learned counsel for the applicant Brown, obtained leave to argue five Supplementary Grounds of Appeal. These were as follows:

> "**1.** The Learned Trial Judge erred in law by failing to rule at the close of the prosecution's case that the prosecution had not established a prima facie case against the Applicant (page 649 of the Record).
>
> **2.** The learned Trial Judge failed to leave the defence of Duress for the consideration of the jury, as the said defence was raised in the Applicant's caution statement (pages 422 to

425, and in particular page 423, lines 10 and 11; also, page 707, lines 15 to 17 of the Record).

**3.** The Learned Trial Judge's directions on joint enterprise and/or common design and/or the Applicant's caution statement were inadequate, as they omitted any consideration for the jury of either the foreseeability test in joint enterprise or the Applicant's **mens rea** which must have operated to the prejudice of the Applicant (pages 707 to 709 of the Record).

**4.** The learned Trial Judge's direction to the jury on their role and/or function in deciding the issue of the Applicant's **mens rea** was wrong in law as it appeared to cast the jury in the role of prosecutor. The said direction amounted to a fundamental misdirection in law and thereby deprived the Applicant of a fair trial (page 689, lines 5-10 of the Record).

**5.** The sentence was manifestly harsh and excessive in view of the antecedent history of the Applicant and all the circumstances of the case (pages 728 to 730; page 734, lines 17 to 20).

Of these, counsel sought to advance submissions only in respect of Ground 2 and in so electing he pre-empted the Court's own view in relation to the other grounds which were devoid of any merit.

In advancing his arguments on Ground 2, learned counsel submitted that the applicant Brown had gone along with the other men to the O'Connor's premises on the night in question out of fear for his life as one of the party who was armed with a gun had threatened him to burn down the house where he lived if he did not come along with them: (see cautioned statement taken from Steve Brown). In the circumstances the learned trial judge ought to have directed the jury on duress as given the contents of the

cautioned statement taken from Brown, duress arose as an issue in the case. As the learned trial judge failed to deal with this question this amounted to a material non-direction which would have vitiated the conviction in respect of Brown for non-capital murder. Counsel relied in support on Director of Public Prosecutions for **Northern Ireland v. Lynch** [1975] AC 653, [1975] 2 W.L.R. 641; 61 Cr. App R; [1975] 1 All E.R. 913.

Learned counsel for the Crown in responding submitted that the principle enunciated in **Lynch** (supra) as it relates to the defence of duress is no longer good law. Counsel cited in support the case of **Regina v. Howe et al** (cojoined appeals) [1987] 1 A.C. 417 a decision of the House of Lords in which the decision in **D.P.P. v. Lynch** was overruled. The headnote to the judgment reads as follows:

> "In the first appeal, the two appellants with an intended victim were driven by M to an isolated area where the appellants and M. assaulted the victim and then M. killed him. On a second similar occasion, the appellants jointly strangled a victim. On a third occasion the victim escaped. The appellants were tried. Indictment on two counts of Murder and on one count of conspiracy to Murder. Their defence was that they feared for their own lives if they did not do as M. directed. The learned trial judge left the issue of duress to the jury in respect of the first murder committed by M. and the Conspiracy to Murder (count 3) but not on the second count of Murder where the victim was strangled by the appellants. He directed the jury that the test of duress was whether a sober person of reasonable firmness sharing the appellants' characteristics would have responded to the threats by taking part in the killing. The appellants were convicted on the three counts.
>
> On appeal by the appellants: Held dismissing the appeals, that it was not a defence to a charge of murder that the accused had acted under duress in

> order to protect his own life or that of his family, accordingly, the defence was not available to the person who actually killed the victim and it was also not available those who had participated in the murder as principals in the second degree, and therefore the appellants had been rightly convicted for murder. (Emphasis is supplied)

The authority of **Regina v Howe** (supra) has been followed in this jurisdiction by this Court in **Regina v Wayne Spence** SCCA 202/88 (unreported) delivered on 18th June 1990; and **Regina v Trevor Bennett** SCCA 64/99 (unreported) delivered on July 15, 1991. In the latter case Morgan, J.A. cited with approval the dictum of Rowe, P. in **Regina v. Wayne Spence** (supra) where the learned President after a careful and extensive review of the law and the authorities on duress, concluded:

> "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."

On the evidence contained in the printed record in this appeal the applicant Steve Brown was at least a principal in the second degree and as such the defence of duress did not avail him. This ground accordingly fails.

## Conclusion

The case against each of the applicants rested on the cautioned statement admitted into evidence following a voir dire to test the admissibility of the statements. The jury by their verdict accepted the statements as being voluntarily made by the applicants and true in so far as the contents sought to identify the respective roles played by them in the events of the night of July 7, 1991, at the O'Connor's residence. The learned

trial judge in her summation was careful to remind the jury of the need to approach the examination of the statements with the necessary caution having regard to the reliance being placed on them by the prosecution. There had been no complaint made by learned counsel for either of the applicants as to how the learned judge went about her task in this regard. Having carefully examined the summation we have found no fault in her directions.

In the circumstances we can find nothing of substance to cause us to disturb the convictions in this matter.

**Sentence**

The learned trial judge in ordering the period to be served by each applicant before any consideration of parole, while taking into consideration their antecedents, took also into account the circumstances of the killing. Here again this situation was another case of someone's home being invaded by miscreants, and, a hardworking breadwinner's life being brutally taken. The period to be served before parole, can be seen therefore, as calculated by the learned judge having taken into consideration the long period that the applicants were in custody before the trial was eventually concluded. When that is considered, then this period was in conformity with the range usually accorded to fit the abhorrent nature of the crime. On a careful examination of the circumstances relating to the killing of the deceased, we cannot say therefore that in addition to the mandatory sentence of life imprisonment the period fixed by the learned trial judge that each applicant serve before being eligible for parole was manifestly excessive so as to cause us to interfere.

In the result it was for the aforementioned reasons that we treated the hearing of these applications as the hearing of the appeal and made the orders that were referred to at the commencement of this judgment. For purposes of parole the sentence to commence on 16th January, 1999.