

29, 1969

IN THE PRIVY COUNCIL

No. 15 of 1969

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

MALONEY GORDON

Appellant

- and -

THE QUEEN

Respondent

RECORD OF PROCEEDINGS

15. 1969
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- 1969
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(i)

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ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

MALONEY GORDON Appellant

- and -

THE QUEEN Respondent

RECORD OF PROCEEDINGS

NO. 1

INDICTMENT

In the Supreme
Court

No. 1

Indictment

20th September
1967

10

THE QUEEN v. MALONEY GORDON and DENNIS BARTH

IN THE SUPREME COURT FOR JAMAICA

IN THE CIRCUIT COURT FOR THE PARISH OF KINGSTON

IT IS HEREBY CHARGED on behalf of Our Sovereign
Lady the Queen:

Maloney Gordon and Dennis Barth are charged with
the following offence:

STATEMENT OF OFFENCE

Murder

20

PARTICULARS OF OFFENCE

Maloney Gordon and Dennis Barth, on the 19th day
of February, 1967 in the parish of Kingston,
murdered Andrew Barton.

(Sgd) E.L. Chambers,
for Director of Public Prosecutions.
20th September, 1967.

In the Supreme Court

NO. 2

ALLEN BARTON

Prosecution Evidence

ALLEN BARTON: Sworn: Examined by Mr. Kerr:

No. 2

WITNESS: Allan Barton.

Allen Barton Examination

Q. You say your name is Allan Barton?
A. Yes.

Q. And Mr. Barton, what is your occupation?
A. I am a merchant.

Q. And do you live at 29 Dewsbury Avenue, Kingston 6?
A. That is right.

10

Q. The deceased man, Andrew Barton, was he related to you?
A. Yes, he was my nephew.

Q. And at the time of his death how old was he?
A. Nineteen years old.

Q. Now, on the 19th of February, this year, at about 3.20 a.m. where were you?
A. I was at home.

Q. And while there did you get certain information?
A. I did.

Q. And as a result did you go along the Palisadoes Road, Kingston?
A. I did.

20

Q. And there on a track to the left hand side of the road going towards the airport did you see anything?
A. Yes.

Q. What?
A. I saw the lifeless body of Andrew Barton.

Q. Mr. Barton, later that day did you attend the Public Morgue in Kingston where Dr. Martin performed a postmortem examination on the body?
A. I did.

30

Q. And did you identify the body as that of your nephew?
A. Yes.

(Mr. Kerr sits)

MR. KIRLEW: No questions please, M'Lord.

MR. EDWARDS: No questions.

MR. KERR: M'Lord, may the witness be released if he wishes?

HIS LORDSHIP: Yes.

In the Supreme Court

Prosecution Evidence

No. 2

Allen Barton Examination (continued)

NO. 3

CAMILLE CHUNG

No. 3

Camille Chung Examination

CAMILLE CHUNG: SWORN: EXAMINED BY MR. KERR:

Q. Now, what is your name? A. Camille Chung.

10 Q. Miss Chung, I am asking you if you will kindly keep your voice up so that these ladies and gentlemen may hear you, the accused men, Counsel on both sides. Try your best; listen to me carefully and answer the questions if you can. How old are you?
A. Eighteen years.

Q. Now, where do you live? A. No. 2 Glebe Crescent.

Q. That is in Kingston 10? A. Ten, yes.

20 Q. Are you now working? A. Yes, I am.

Q. What work do you do? A. Secretarial work.

Q. You knew Andrew Barton? A. Yes I did.

Q. On Saturday night, the 19th of February, this year, did the deceased and you go anywhere? A. Yes, we did.

Q. Where did you go? A. I went to the Drive-in Theatre, Harbour View.

Q. You went to the Cinema show there? A. Yes.

HIS LORDSHIP: On what night?

30 A. The 19th of February

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

MR. KERR: It was a Saturday night, was it not?
A. Yes, it was.

Q. And what show you went to, the early show or
the late night show? A. The late show.

Q. And when did that commence? A. I believe
about 9.15, I am not sure.

Q. Speak up please just a little more.
Now, after the picture was over did you go
anywhere? A. Yes.

10

Q. Where? A. Along the Palisadoes Road.

Q. How did you get there? A. In Andrew
Barton's car.

Q. He drove? A. Yes.

Q. Only the two of you? A. Yes.

Q. What sort of a car did he have? A. A 'M.G.'

Q. Sports car? A. Yes.

Q. How many seats? A. Two.

Q. You mean a seat in front? Did you have a
back seat? A. No.

20

Q. What sort of a top it had? A. It is a
convertible top.

Q. Was the top up or down? A. Down.

Q. Now, when you got to the Palisadoes Road did
he do anything? A. He stopped the car along
the beach.

Q. Parked it? A. Yes.

Q. How was it parked? On the road or off the
road? A. Off the road.

Q. On which side? A. The left side.

30

Q. That is going towards the airport? A. Yes.

Q. How was the car parked? Parallel to the road,
or diagonal, facing the road? A. Facing the
road.

Q. Did you remain in the car for some time -
both of you? A. Yes.

In the Supreme
Court

Q. And did you leave the car? A. Yes.

Prosecution
Evidence

Q. And where did you go? A. Behind the car.

No. 3

Q. Did you stand up there or did you sit down?
A. Sat down.

Camille Chung
Examination
(continued)

Q. Sat on the beach? A. Yes.

Q. Facing ---? A. Facing the sea.

10

Q. And I believe you were there for some time?
A. Yes.

Q. Now, did anything happen while you were
there? Did anything happen while you were
there? What is the first thing happened
there, when you were sitting there? Did
anyone come there? A. Yes.

Q. About what time? A. About 2.00 o'clock.

Q. About 2.00 a.m.? A. Yes.

HIS LORDSHIP: I can't hear you. The accused
can't hear you.

20

MR. KERR: Miss Chung, keep your voice up.
Counsel want to hear, help us please, try
and lift your voice.
Now, while you were sitting there, what you
say happened? A. About five boys came along.

Q. Where did they come from? A. I don't know
where they came from.

Q. From what direction I mean? A. They were
behind, from behind.

30

Q. And when you first saw them how far off
were they? A. About five yards.

Q. Were they far apart or were they close
together? A. They were standing quite close
together.

Q. When you saw them were you still sitting?
A. Yes I was.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

- Q. Did you speak to Barton? A. Yes.
- Q. And after you spoke to him did either or both of you do anything? A. Yes, we both got up.
- Q. Did you still face the sea or did you turn round? A. Turned around.
- Q. And where were the five men then? A. They were now standing in a semi-circle in front of us.
- Q. What happened next? A. Two of them held on to me. 10
- Q. Where did they hold you? A. On my hand, held me by my arm.
- Q. Did the others do anything? A. The other three held on to Andrew.
- Q. When they held you, did you do anything?
A. (No answer)
- Q. Miss Chung, try and compose yourself. The quicker we get on the quicker we will get through. When they held you did you do anything? A. No. 20
- Q. When they held Barton, did he do anything?
A. No.
- Q. Then what happened next? A. They asked for any jewellery
- Q. They spoke to you? A. Yes.
- Q. That is the two or the five of them? A. Two of them.
- Q. And what happened to Barton and his three?
A. They drew him away from me. 30
- Q. They drew him away? A. Yes.
- Q. Did he go easily? A. No, he struggled with them.
- Q. While he was struggling with them what did you do? A. The other two were still holding on to me and I was trying to drag myself to the car.

- Q. How far off was the car? A. Few yards away.
- Q. Did you get to the car? A. Yes.
- Q. When you got to the car did you get in or you stayed outside? A. I got in.
- Q. When you got in where was Barton and the three men? A. On the right side of the car a few yards away.
- Q. About two yards away? A. A few yards.
- 10 Q. Could you see what was happening?
A. Yes, I could.
- Q. Now, of the three men that were there would you be able to know them again?
A. Yes.
- Q. Do you see any of them here today?
A. Yes.
- Q. Where? A. (Witness points to prisoners' dock)
- Q. These (indicating towards dock) A. Yes.
- 20 Q. Now, while they were struggling with Barton and you in the car did you hear anybody speak? A. Three of them held on to Andrew speaking to him.
- Q. Do you remember anything that was said by either the men or Barton? A. Andrew told them they should take everything he had.
- Q. Did you say anything? Did you speak to Barton or to anybody? A. Yes, I spoke to the ones holding on to me.
- 30 Q. Did you speak to Barton? Did you call to him? A. Yes. Yes, I called to him.
- Q. When you called to him could they have heard? A. I called him.
- Q. Now, while they were struggling did you notice the men there? Could you see the men clearly? A. Yes, I could.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

Q. Did you notice anything about any of them?
A. Not that I could remember.

Q. I mean did you see any of them doing anything? A. One of them had ---- Please repeat the question?

Q. When they were there did you see any of them doing anything with Barton?
A. They were still struggling.

Q. Did you hear anybody say anything?
A. (No answer).

10

Q. Now, you said the two men were ---- The three, could you see them clearly?
A. Yes.

Q. Could you see their hands? A. I didn't look at their hands, two were holding on to me.

Q. Yes, and the three were holding Barton; tell us what happened?

HIS LORDSHIP: Could you have seen their hands? That is what the Prosecutor asked you.
A. The ones holding on to Andrew, yes.

20

Q. You saw one holding Andrew?
A. Three of them.

Q. And while they were holding Andrew what happened? A. I saw a gun in one of them ---- one of them had a gun.

Q. What sort of a gun? Is it a long gun or a short gun? A. It was short.

Q. Could you make out which one had the gun?
A. I can't remember which one had the gun.

30

Q. And what happened when the man had the gun? What happened? A. Andrew told them that he had a gun too.

Q. And what happened next? A. They were still struggling?

Q. Yes, go on? A. And then I heard a shot.

Q. And where was the man with the gun then?
A. All three of them surrounded him.

In the Supreme
Court

Q. The man with the gun was there? A. Yes.

Prosecution
Evidence

Q. Did he stop his struggling? After you heard the shot did Barton stop struggling with them? A. No, he continued.

No. 3

Q. And what happened next? A. There was another shot.

Camille Chung
Examination
(continued)

10 Q. Yes, and then what happened? A. Andrew fell.

Q. Now, before the shot was fired, did you hear anybody say anything; any of the men? A. I can't remember.

20 Q. Try and help us. I know it is difficult, it is February, but, did you hear anyone say anything before the shot was fired, before Barton said he had a gun? Did you hear anybody say anything before or after Barton said he had a gun too? A. Before he said that?

Q. Yes, what happened? A. He told them to take everything he had.

Q. And when he said he had a gun too, was it before you saw the man with the gun or after you saw the man with the gun? A. I can't remember.

Q. Now, as far as you know, did you see Barton with any gun that night? A. No.

30 Q. Now, after the second shot was fired what happened? A. Andrew fell then the boys ran. A car was passing at the same time.

Q. And what were you doing when the car was passing? A. I was still in the car.

Q. Were you still in it; were you saying anything? A. I was screaming.

Q. What happened to this passing car.
A. They went on a little ahead and turn, they turned back. By this time the fellows had run.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

Q. The fellows ran? A. Yes.

Q. Did you go down to where Barton was? A. Yes.

Q. And did you notice anything? A. Yes, he was bleeding.

Q. From where? A. From his heart.

Q. From his chest? A. From his chest.

Q. Did the men from the car come down to where Barton was? A. When they turned back I ran to the car and asked them to help me.

Q. You spoke to them? A. Yes.

10

Q. And they left? A. Yes.

Q. And did two other cars come along?

HIS LORDSHIP: You spoke to the men in the car then they left? A. Yes, sir.

MR. KERR: Two other cars came along? A. Yes.

Q. And the occupants from the car stayed with you until the police came? A. Yes.

Q. And when the police came was Barton the same place where he fell? A. Yes.

Q. And was the car in the same position? A. Yes. 20

Q. And was he alive when they came?
A. No.

Q. He was dead? A. Yes.

Q. And how long after the boys ran did the police come, can you give us an idea?
A. About twenty minutes or half an hour.

Q. Now, how was Barton dressed; you remember?
A. He had on a white shirt and white shorts.

Q. The shirt was in good order when he had it on? A. I am not sure.

30

Q. Did it have any tear in it when he had it on? A. I don't remember.

Q. It was a good short he had on or was a tear in it? A. I don't know.

In the Supreme Court

Q. Look at these clothes ... (Clothes shown to witness)

Prosecution Evidence

HIS LORDSHIP: You don't remember the condition of the shirt? A. No.

No. 3

MR. KERR: These are the clothes -- that is the shirt? A. Yes.

Camille Chung
Examination
(continued)

10 Q. When you were with him, did it stay like that when you were on the beach? Did the shirt stay like that when you were together on the beach? A. No.

Q. What is the difference now? I beg to tender the clothes as Exhibit 1, M'lord. A. It was not torn.

Q. And what about the blood? A. After he was shot.

20 Q. Shirt and Pants M'lord, Exhibit 1. Did he have on anything on his hand - any jewellery? A. He had on a watch.

Q. And after he was shot did you see the watch? A. No.

Q. Look at this watch. (Watch shown to witness) Is this the watch? A. Yes.

Q. Exhibit 2, M'lord.

HIS LORDSHIP: Yes. (To witness) Did you see him with that watch on the night? A. When he fell.

30 MR. KERR: No, when you were together? A. Yes.

HIS LORDSHIP: After he fell do you remember seeing the watch? A. No.

MR. KERR: Now, among the policemen who came, was a Sergeant Hanson? A. Yes.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

Q. And you spoke with him? A. Yes, I did.

Q. And did you leave with the police?
A. Yes.

Q. Now, subsequently did you attend some
identification parades at the police station?
A. Yes.

Q. And on two separate days? A. Yes.

Q. Now, on the first day, the 20th of April,
did you point out anyone? A. Yes.

Q. Do you see any of the persons that you
pointed out on the first day here today? 10
A. I can't remember which one.

Q. In court, do you see any of those that
you pointed out in court here today?

MR. EDWARDS: May it please you, M'lud,
she has already answered the question.

HIS LORDSHIP: What do you have recorded in
your mind as the answer?

MR. EDWARDS: "I can't remember which one".

MR. KERR: What you are saying now, two
parades you attended? Now, did you point
out anyone at those parades? A. Yes. 20

Q. Do you see any of the persons what you
pointed out at the parade here?

HIS LORDSHIP: Mr. Crown Counsel, which
parade are you asking about?

MR. KERR: The first parade. (To witness)
Look along the courtroom. A. There were
two parades I pointed out

HIS LORDSHIP: We are speaking of the first
one. 30

MR. KERR: Not the first parade. The first day
you attended two parades, two on the 20th
and two on the 28th? A. Yes.

- Q. On either of the parades of the 20th did you point out people? A. Yes.
- Q. Now, did you see anyone that you pointed out on the parade here - of the 20th? A. I don't know which one. I pointed out two but I can't remember which parade it was.
- Q. Of the two you pointed out, you say you can't remember if it was the first parade or the second? A. Yes.
- 10 Q. Of the two that you pointed out on the 20th, do you see anyone here of the two that you pointed out on the first day? A. I can't remember which parade it was.
- HIS LORDSHIP: I can't hear you, that is why I had to ask counsel to repeat what he heard you said.
- MR. KERR: You can't remember which parade? Well, did you point out anyone? A. Yes, I did.
- Q. Who you pointed out? A. I pointed out one of the boys who held on to me.
- 20 Q. Who held on to you? A. Yes.
- Q. Did you point out anyone else beside those holding you? A. Yes.
- Q. Who you pointed out? A. The others who held on to Andrew.
- Q. Well, do you see any of them here that you pointed out as holding on to Andrew? A. No.
- Q. You don't see any of those who held on to Andrew here today? A. No.
- Q. You see any of those who held on to you? A. Yes.
- 30 HIS LORDSHIP: You see here in court anyone who held on to you? A. Yes, sir.
- HIS LORDSHIP: Could you say which one or who is the one? A. The smaller one.
- MR. KERR: The smaller one held you? A. The smaller one held on to me.
- Q. Barth? (Indicating accused Barth)
- HIS LORDSHIP: He was the one who held on to you? A. Yes, sir.
- 40 MR. KERR: Yes now, on the second day, the 28th of April, did you attend other parades? A. Yes, I did.
- Q. Did you point out anyone there? A. Yes.
- Q. As what? A. (No answer)

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Examination
(continued)

Q. Pointed him out as what? A. One of them who shot Andrew.

Q. Do you see him here today? Speak up.
A. (No answer).

Q. Do you see him here today? A. Yes.

Q. Where is he? A. The taller one.

Q. The taller one? A. Yes.

Q. Did you know any of these boys before this day? A. No, I did not.

Q. Why did you say that he is the one that shot Andrew? 10

MR. EDWARDS: With the greatest respect, M'lud, I think her answer was, "I pointed out one of them".

MR. KERR: You said you pointed him out? A. Yes.

Q. You pointed him out as what? A. The one who shot Andrew.

Q. Now, why did you say that he is the one who shot Andrew? A. I think he is the one who had the gun.

(His Lordship reads from his notes)

Q. You say you think he is the one who had the gun? A. Yes. 20

Q. Now, the two men who held you in the car, did they remain with you all the time?

A. One held on to me, the other went over to where Andrew was then he came back.

Q. Which one went to where Andrew was and then came back? A. The bigger one.

Q. Which one? A. That one (Indicating Barth).

Q. Which of the two? A. The one on the right.

HIS LORDSHIP: You say two held on to you, one of them what, went over to the deceased? A. Yes. 30

MR. KERR: Was that before the shots were fired or after? A. Before.

Q. And where was he when the shots were being fired? A. He was standing by the car with me.

HIS LORDSHIP: Beside you?

MR. KERR: And you say that is who? Barth?

HIS LORDSHIP: Standing by the car when the shots were fired? A. Yes.

HIS LORDSHIP: Which one you say? A. The one on the right. 40

HIS LORDSHIP: The one in the red shirt (Barth in red shirt) A. Yes.

In the Supreme Court

HIS LORDSHIP: So two of them held on to you? A. Yes.

Prosecution Evidence

HIS LORDSHIP: Then one of them went to the deceased? A. Yes.

No. 3

HIS LORDSHIP: And then came back? A. Yes.

HIS LORDSHIP: Then you heard the shots fired? A. Yes, the shots were fired afterwards.

Camille Chung Examination (continued)

10 MR. KERR: That one, Barth, was beside the car then? A. Yes.

(Mr. Kerr sits)

HIS LORDSHIP: Lest I misunderstand the evidence on this aspect of it, if I am right. You said two held on to you - right? A. Yes, sir.

HIS LORDSHIP: One of them, that is one of the two that was holding on to you left you and went over to the deceased? A. Yes.

HIS LORDSHIP: That was before the shots were fired? A. Yes.

20 HIS LORDSHIP: Then that one you say left Barton and come back to you standing beside the car? A. Yes.

HIS LORDSHIP: Beside the car. And that was before the shots were fired? A. Yes.

HIS LORDSHIP: And that person who did that, the one of the two, is the one Barth. Is that so? A. Yes.

CAMILLE CHUNG: CROSS-EXAMINED BY DEFENCE COUNSEL, MR. KIRLEW:

Cross-examination.

30 Q. Now, you say when that car was parked facing the road yourself and Barton went behind the car? A. Yes.

Q. Now, did you go directly behind the car or to the right-hand side of the car or to the left-hand side of the car? A. Directly behind the car, yes.

Q. Now about how far from the car were you both sitting? A. About ten yards.

Q. About ten yards? Is that what you are saying? A. Yes.

Q. And you say after these persons came up Barton and yourself stood up? A. Yes.

40 Q. So you were all facing each other?

HIS LORDSHIP: The two of them facing...?

MR. KIRLEW: Yourself and Barton, both facing these five people? A. Yes.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Cross-
examination
(continued)

Q. And you say two held you and then you dragged yourself to the car? A. Yes.

Q. And you got in the car? A. Yes.

Q. And your face towards the sea?
A. (No answer).

Q. You got to the car? A. Yes.

Q. Went on the seat? What you did when you went in the car? A. Knelt on the seat.

Q. Did what? A. Struggling with the other two fellows.

10

Q. What direction did you face when you got on the seat? A. I was parallel to the road; my back was turned. I was facing Harbour view.

HIS LORDSHIP: You were facing Harbour View?
That is, your face.....? A. Turned that way.

MR. KIRLEW: In other words you were looking over the right-hand side of the car. Is that correct? A. Yes.

Q. Now, was that your position up to the time these shots were fired or did you change your position before? A. That was my position.

20

Q. That was your position during the whole time?
A. Yes.

Q. Up to when the shots were fired? A. Yes.

Q. Now, you say that the three that held Barton struggled with him? A. Yes.

Q. Now, did they move from where he was first held at all during this struggle? A. While they were struggling they were moving.

HIS LORDSHIP: During the struggle? A. Yes.

30

MR. KIRLEW: Now, what direction did they move?
A. In the same direction.

Q. What is that?

HIS LORDSHIP: To the car or away from the car? A. Still parallel to the car.

MR. KIRLEW: Anybody didn't move any nearer to the car or any further from the car?
A. No.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Cross-
examination
(continued)

Q. Did they go nearer towards the airport or nearer towards Harbour View? A. They didn't move any nearer to the car nor away from the car, they were more or less

10 Q. In other words they were moving up and down roughly in the same area? Is that what you want to say? A. Yes.

Q. In other words, they would change their positions, but roughly in more or less the same area? A. Yes.

20 Q. Do you know if during this struggle Barton was still facing in the same direction? Remember this: when you got up Barton and yourself were facing these people that you saw. Am I right in saying that you were facing towards the Palisadoes road? Is that correct? A. Yes.

Q. In other words, the car in front of you, Palisadoes road further on. Is that correct? A. Yes.

Q. You know if Barton was facing in the same direction up to the time the shots were fired or had he changed from the position in which you were looking? Do you know? A. Yes, his position was changed.

30 Q. From facing the road, what direction did he face? A. The sea.

Q. Is that the open sea? A. Yes.

Q. Now, what about the men? Were they facing the open sea or did they change position? A. They were facing the road.

Q. Are you saying that that is the position you were in when the shots were fired? A. I am not quite sure.

40 Q. Now, you say that Barton and yourself stood up and faced the men, the men were facing you and also facing the open sea? A. Yes.

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Court

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Evidence

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Camille Chung
Cross-
examination
(continued)

- Q. Then you struggled to the car? A. Yes.
- Q. At the time when you reached the car, just at the time when you reached the car can you say where those men and Barton were facing? Just at the time when you reached the car, had Barton turned around yet? A. He was facing the road.
- Q. He was facing the road when you reached the car? A. Yes.
- Q. So it was after you were in the car that the positions were changed? A. Yes. 10
- Q. Now, wasn't that a dark night? A. No, I wouldn't say that.
- Q. You wouldn't say it was dark? A. No.
- Q. The car lights were not on? A. No.
- Q. There are no street lights there? Are there any street lights at that spot? A. No.
- Q. You had no moonlight? A. I can't remember
- Q. You can't remember if 2.00 o'clock that morning there was moonlight or not? A. No. 20
- Q. I am suggesting to you that it was a dark night? A. (No answer).
- Q. And it was impossible for you to make out the features of these people. That is my suggestion to you?
- HIS LORDSHIP: What you have to say to that? You have heard the suggestion? A. Yes.
- HIS LORDSHIP: What you have to say to that? A. Well I could make out the features.
- MR. KIRLEW: And could you make out the features of these three people holding Barton ten yards away from you? You could do that? When you were in the car Barton was at least ten yards away from you, according to you. A. No. 30
- Q. He wasn't ten yards away from you? A. No.

Q. Was it more than ten yards away from you?
A. Less than that.

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Court

Q. About how far from you? A. Just a few yards away.

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Evidence

Q. What you call a few yards? How many yards do you call a few yards? A. About six.

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Q. About six yards from where you were in the car to where Barton and the men were, about six yards? A. Yes.

Camille Chung
Cross-
examination
(continued)

10 Q. So they had moved nearer to the car then?
A. In the struggle they moved nearer.

Q. But I had asked you that previously and you said no. A. In the struggle.

Q. You are now saying that they had moved nearer? A. They were more or less in the same area.

HIS LORDSHIP: Moved nearer, but in the same area. When you say drew nearer you mean in the same or near to the car? A. Same area.

20 MR. KIRLEW: You said previously, when the car was parked yourself and Barton went and sat behind the car and you were ten yards from the car? A. When I was behind the car. Repeat the question for me.

Q. Did you say when the car was parked yourself and Barton went and sat about ten yards behind the car? A. Yes, about that.

Q. And did you and Barton get up at the same place you were standing? A. Yes.

30 Q. And did you say that during the struggle he didn't come any nearer to the car and he didn't go nearer to Palisadoes or to Harbour View, he moved in spots on the ground but they were more or less in the same area? A. No.

Q. You didn't say that? A. Yes I did.

Q. But you are saying that at the time when the shots were fired he wasn't ten yards again behind the car, he was six yards behind the

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No. 3

Camille Chung
Cross-
examination
(continued)

car? A. When they drew him away he was almost parallel to the car. Then I was in the car. At the time he was about six yards away from the car.

Q. What time did he move from ten yards to six yards? A. When we stood up.

Q. You moved from your position when you stood up. A. When they drew me away.

Q. And what about Barton? A. Yes, they drew him away too.

10

Q. Nearer to the car? A. Yes, further up.

Q. Don't hear you. A. Yes, nearer to the car.

Q. At any rate, you are now saying that he was six yards behind the car or six yards away from you when the shot was fired? A. Yes.

Q. Now I am suggesting that at that time of the night you couldn't recognise people six yards away - the features of people six yards away. You could only see figures but you could not recognise the features.
A. I could see.

20

Q. You say there were three people holding Barton? A. Yes.

Q. And you say that that accused was one (indicating Maloney)? A. Yes.

Q. And there were two others? A. Yes.

Q. Do you remember what part of Barton this accused held - where this accused held on?
A. They were all standing around him.

Q. Did anyone hold him at all? A. I think they all held on to him.

30

Q. You think? "I think they all held on to him".
A. Yes.

Q. Can you give me a description of the other two people that you saw holding him? Tell me about the other two. Any one. Take one by one. A. Medium height; both slim fellows.

Q. Yes. And both ---? A. Medium height.

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Q. What you call medium height? Suppose we make you stand up.

Prosecution Evidence

(Accused Maloney stands) Sit for a moment please. We go on a little more first.

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You say, medium height and both slim?
A. Yes.

Camille Chung
Cross-examination
(continued)

Q. Describe anything more about these two people for me? A. They all had on dark clothing.

10 HIS LORDSHIP: All three or all two?
A. Two.

MR. KIRLEW: Yes. Anything else? Describe the others. Anything else you could notice about them? A. No.

Q. You say you can't remember anything else about these other two people? A. I can't remember anything in particular about them.

20 Q. Suppose I try and help you. What about the complexion of these other two? A. Well, they were all the same complexion.

Q. As far as you could see? A. Yes.

Q. Would you say they were all the same height? A. No, I wouldn't say that.

Q. You know which was shorter and which taller? A. (No answer)

Q. All slim? A. Yes.

Q. Did you hear any of these three people say anything? A. No.

30 Q. And you had never seen any of these people before? A. No.

Q. Now, are you definite that there were five people? Did you say about five people, or did you say precisely five people? A. I said there were about five.

Q. Could there have been more? A. I am almost sure it was five.

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Court

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Camille Chung
Cross-
examination
(continued)

Q. Almost sure of the five? A. Yes.

Q. Were you shown any pictures of any of these people before the identification parade?

A. No.

Q. Were you told in what positions these people would stand at the parade? A. No.

Q. Did you see any of these people before the parade? A. No.

Q. Apart from the night when you were saying that you saw them, did you see them between that night and the parade? A. No.

10

Q. That is all, M'lord.

CROSS-EXAMINED BY DEFENCE COUNSEL, MR. EDWARDS:

Q. Now, Madam, when you gave evidence-in-chief to my learned friend you said about five people were there? A. Yes.

Q. You meant by that, did you not, that you were not certain whether there were five people or more than five? A. Yes.

Q. And you meant to give a truthful answer then? A. Yes.

20

Q. So the truth you told this court when you replied to my learned friend was that you thought there were about five people? A. Yes.

Q. And that is the truth? A. Yes.

Q. So the truth is you are not certain whether there were five or more than five? A. Yes.

Q. You are not certain. A. I also said that I was almost sure there were five.

Q. You also said you were almost certain there were about five. So there could have been six or there could have been seven? A. No.

30

Q. There were about five, meaning you are not absolutely certain that there were five? Isn't that what 'about five' means? A. Yes.

Q. Doesn't that mean, therefore, that there could have been six? A. There could have been six.

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Court

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Evidence

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Camille Chung
Cross-
examination
(continued)

- Q. Or there could have been seven, because that is 'about five'? A. No, there were not as many as seven.
- Q. There were not as many as seven, but there could have been six? A. Yes.
- 10 Q. Madam, you said you were out on the Palisadoes road on this beach. Now, normally on the Palisadoes road at 2.00 o'clock in the morning there are only these sources of light - am I not right madam? First, moonlight? A. Yes.
- Q. There was no moonlight that night? A. I am not sure.
- Q. If it had been bright moonlight, if the moon had been shining overhead, you would have been sure. You were sitting out there in the open. If the moon had been there you would have seen the moon. A. I am not sure.
- 20 Q. But you are certain there were no street lights. Right? A. I am not sure about that either.
- Q. You are not certain whether there were any street lights along that stretch of Palisadoes road? A. No.
- Q. So you are saying there are street lights along that stretch of the Palisadoes road? A. I am not saying that.
- 30 Q. What you are saying is that you are confused; that you are not certain whether there are or not. Isn't that what you are saying? A. Yes.
- Q. So that, let us put it very, very bluntly. You are not certain whether it was not dark night or not? A. Yes.
- Q. Now, madam, all was peaceful, all was quiet until these men appeared. A. (No answer).
- Q. You turned around and saw the men? A. Yes.
- 40 Q. Immediately you became afraid, did you not? A. Yes, I was afraid.

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Court

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Evidence

No. 3

Camille Chung
Cross-
examination
(continued)

Q. And from then on you became increasingly afraid. You were, in fact, terrified, weren't you? A. No, I wouldn't say that.

Q. You were frightened? A. Yes.

Q. Two men came and held you? Right? A. Yes.

Q. You didn't wish to be held? A. No.

Q. You became more terrified, more frightened, when they held you? A. No, I wouldn't say that.

10

Q. I can't hear a word. A. No, I didn't.

Q. You didn't become more frightened when they held you? A. No.

Q. Did you wish them not to hold you? A. Yes I did.

Q. And you struggled? A. Yes I did.

Q. Now from the moment that they held you, you were concentrating, were you not, on getting away from the men who held you? A. Yes I was.

Q. And you struggled to the car? A. Yes I did.

20

Q. Dragging them? A. Yes.

Q. So they were almost behind, you were going forward, and they were resisting you? Right? A. Yes.

Q. So they were almost behind you? A. Yes.

Q. And you got into the car? A. Yes.

Q. Now, while you were struggling your one aim then was to get into the car? A. Yes.

Q. So during that time your eyes were on the car, you were struggling to get into the car, and you were aiming for the car and going towards the car, so your eyes were on the car? A. No.

30

Q. Now, when you were in the car you looked and you saw Barton and the other men? A. Yes.

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Court

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Evidence

No. 3

Camille Chung
Cross-
examination
(continued)

- Q. Having lost sight of him when you were going towards the car? A. No I didn't.
- Q. So then, you were walking to the car with your eyes not turned on the car? A. Well, I was looking at Andrew.
- 10 Q. While you were walking towards the car, while aiming at the car, while struggling to get to the car, you didn't have your eyes on the car? You didn't have your eyes on the car? A. Yes I glanced towards the car to see where I was going.
- Q. You had to concentrate to get to the car or you might have passed it. Isn't that so madam? A. No.
- Q. Well are you saying the men were struggling with Andrew - milling around confused -- milling around? Isn't that so madam? A. They were standing around him.
- Q. And struggling was going on? A. Yes.
- 20 Q. So there was a confused movement of bodies? A. There was not much struggling.
- Q. But when people struggle bodies move? A. Yes.
- Q. So when the struggle was going on bodies were moving? A. Yes.
- Q. So all the bodies were moving from one position to the other position? Isn't that so madam? -- when the struggling was going on? A. Yes.
- 30 Q. And it is because of this that you can't say who did what to the other person - because of this confused movement of bodies while the struggling was going on? A. (No answer).
- Q. You had all these bodies moving - isn't that so? -- A. Yes.
- Q. -- at the same time and you cannot tell where one body was at one second and where the other body was at the other second. Isn't that so? There was a struggling going on. A. Yes.
- 40

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Court

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No. 3

Camille Chung
Cross-
examination
(continued)

HIS LORDSHIP: The witness has answered yes to the fact that there was a struggling going on.

MR. EDWARDS: I see, M'lud. (To witness) Now, while this struggling was going on all the bodies were moving? A. No.

Q. So they were struggling but staying perfectly stationary? A. They were not all moving at the same time.

Q. But while the struggling was going on the bodies - some of the bodies - shifted positions? 10
A. Yes.

Q. One minute one is facing -- was towards you; the next minute the back was towards you. Isn't that what happened lady? Isn't that how people struggling struggle? A. Yes.

HIS LORDSHIP: We are not concerned how people struggle. They may be struggling between themselves right now.

MR. EDWARDS: I appreciate that M'lud, I am merely going from the general to the particular. 20
(To witness) Now, you have told me, did you not, that the bodies of the persons struggling moved? A. Yes.

Q. Now, in that movement, at one stage some of the bodies would be sideways towards you?
A. Yes.

Q. At any time some of the bodies would be facing you? A. Yes.

Q. At any time some of the bodies would have their backs towards you? A. Yes. 30

Q. At any time you may have three people in a row, or things like that - constant change of movement. Sometimes you could see Andrew, at other times you couldn't see him because of the movement of the bodies. Isn't that so madam? A. Yes.

Q. No further questions, M'lud (Mr. Edwards sits)

HIS LORDSHIP: Any re-examination?

RE-EXAMINATION BY MR. KERR:In the Supreme
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Evidence

No. 3

Camille Chung
Re-
examination

Q. Now you said that when the men came down,
how many held you? A. Two.

Q. How many held Barton? A. Three held him.

Q. Apart from the two holding you and the three
holding Barton, did you see any more?
A. No.

10

Q. Now, on the other side of the road, across
from where your car was, is the city?
A. Yes.

Q. Could you see the lights of the city from the
car - from where the car was? A. I can't
remember.

Q. Now you said when they were struggling they
were moving? A. Yes.

Q. What colour clothes Barton had on? A. White.

Q. What colour clothes the other men had on?
A. All in dark clothing.

20

Q. You said now that when the shot was fired,
how far you say the men were from you - the
men with Barton? A. I think six yards.

Q. Would you point out for me please from where
you are to where Barton was? Point out six
yards. A. To that table from here (point to
table in courtroom).

30

Q. Which part of the table? The part nearest
to you or the part furthest from you? Tell
the gentlemen to stop where you think they
were from you (Policeman walks towards table
and stops alongside the end of table when
told by witness) About there? A. Yes.

Q. Now, you described the two other men as
slim and medium height. What would you
describe this man as? Stand up (Accused
Maloney stands). A. The other two were
a bit shorter.

Q. The other two were shorter? A. Yes.

In the Supreme
Court

Prosecution
Evidence

No. 3

Camille Chung
Re-
examination
(continued)

Q. Yes, you say the other two were shorter.
Well, what would you describe him as?
A. Average height.

Q. Now, at the time that the shot was fired
what was the position of Barton in relation
to the three men and to you? In other words
how were they positioned as regards you,
first? Who was nearer to you when the
shots were fired? A. We were all about the
same distance.

10

Q. Could you see Barton when the shot was fired?
A. Yes I could.

Q. Could you see the three men? A. Yes I could.

Q. At the moment that the shot was fired, what
was happening at that very moment?
A. (No answer).

Q. At that moment when the shot was fired were
they still struggling, standing around him
or? A. They were standing around him.

Q. Now, after the first shot was fired, were
they still there after the first shot?
A. Yes.

20

Q. And did the second shot follow shortly after
or a long time after? A. Shortly after.

Q. Were the men still there? A. No they ran.

Q. Before the shot fire or after? A. After the
shot was fired.

Q. How many guns you saw that night? A. One.

Q. And did the gun ever change hands at all as
far as you know?

30

MR. KIRLEW: I object to that M'lord, this did
not arise out of the cross-examination.

HIS LORDSHIP: Yes Mr. director?

MR. KERR: M'lord, as this milling around came in,
if it does not arise it arises by implication.

HIS LORDSHIP: Yes she may answer. (To witness)
Now first of all the other question was:

How many guns you saw? A. One.

MR. KERR: Did you see it change hand at all that night? A. No.

(Mr. Kerr sits)

HIS LORDSHIP: Mr. Kirlew, on this aspect of the question where I have given leave you are entitled to ask any questions.

MR. KIRLEW: I do not wish to ask any questions M'lord.

10 MR. EDWARDS: No questions M'lud.

In the Supreme Court

Prosecution Evidence

No. 3

Camille Chung
Re-examination
(continued)

NO. 4

GIFFORD LINTON

No. 4

Gifford Linton
Examination

GIFFORD LINTON: Sworn: Examined by Crown Counsel:

Q. Your Name? A. Gifford Linton, Inspector of Police stationed at Central in the parish of Kingston.

20 Q. Now, on Thursday the 20th of April, 1967, were you in charge of identification parades held at the Central Police Station?
A. Yes, sir.

Q. Two parades were held that day? A. Yes, sir.

Q. The first one at what time? A. One ten p.m. The second 3.15 p.m.

HIS LORDSHIP: The second was what? A. The second parade M'lord, was 3.15 p.m.

30 MR. KERR: This second parade, did it have in any of the men that you had on the first parade? A. No, sir.

Q. And that second parade consisted of how many men? A. Nine men including the accused.

Q. Which accused? A. Dennis Barth.

In the Supreme
Court

Prosecution
Evidence

No. 4

Gifford Linton
Examination
(continued)

- Q. Now, before the parade was lined up did you speak to the men on parade, including the accused? A. Yes, sir.
- Q. What you told them? A. I told the accused that I was about to hold a parade, the purpose for which I was holding the parade.
- Q. What you told him? A. I told him I was holding a parade on the suspected case of murder. He could have a solicitor or a friend to represent him if he wished. He said he had none. 10
- Q. Did you tell him further with what suspected case of murder? A. Yes, sir.
- Q. What? A. The murder of Andrew Barton which took place on the 19th of February at Palisadoes road.
- Q. How were the men as regards their appearance? A. They were similar in height, build, colour, age and dress, status in life as close as possible.
- Q. Now, when the parade was being formed, the witness Camille Chung A. She was out of sight and hearing. 20
- Q. Now, did the accused man make any election or selection having told him of his rights? A. Yes he said he had no one to represent him. After the parade was lined up I asked him if he was satisfied with the men on parade. He said he was satisfied. I told him he could select any position he wished, he selected number 5 position from the right. 30
- Q. Did the witness Camille Chung come along the parade? A. Yes, sir.
- Q. And when she came did you speak to her in the presence and hearing of the parade, including the accused? A. I did, sir.
- Q. What she said? A. I asked her if she knew why she came to the parade. She said Yes, she came to see whether she could identify anyone in the parade as one amongst about six who held her up along with Andrew Barton along the Palisadoes road about 2.45 a.m. on the 19.2.67 and shot and killed Barton. 40

Q. Yes? A. I told her on the parade were nine men; she should walk in front, if she saw any she should touch him and say 'this one'.

Q. Yes? A. She did so and then touched the accused and said 'this is one here'. The accused made no statement.

HIS LORDSHIP: Touched the accused Barth and said...? A. Said 'this is one here' M'lord.

10

MR. KERR: Now, at the earlier parade did she point out anyone? A. Yes, sir.

Q. Which one? A. Garth Williams, sir.

(Mr. Kerr sits)

MR. KIRLEW: No questions M'lord.

MR. EDWARDS: No questions, M'lud.

MR. KERR: M'lord, I do not know if this may be a convenient time?

20

HIS LORDSHIP: Mr. Foreman, Members of the Jury, we will take the adjournment now to 2.00 p.m. During the period of the adjournment do not discuss this case with anyone or among yourselves. The time will come when you discuss the case among yourselves and that will be when you shall have retired to consider your verdict. Do not allow anyone to approach you concerning the case.

Adjournment taken 12.45 p.m.

Resumption 2.05 p.m.

In the Supreme Court

Prosecution Evidence

No. 4

Gifford Linton Examination (continued)

In the Supreme
Court

NO. 5
WINSTON FACEY

Prosecution
Evidence

No. 5

Winston Facey
Examination

WINSTON FACEY: SWORN: EXAMINED BY MR. KERR:

Q. You say you are Winston Facey? A. Yes, sir.

Q. Inspector of Police? A. Yes, sir.

Q. Stationed at Central Police Station? A. Yes, sir.

Q. On the 28th of April, this year, you held an identification parade at the Central Station?
A. I did, sir.

10

Q. At cell block? A. Yes, sir.

Q. How many parades you held? A. Two.

HIS LORDSHIP: What is that?

A. Two parades were held.

MR. KERR: Now, the first parade was held at what time? A. One-thirty p.m.

Q. Did you make notes of what happened on the parade? A. I did sir.

Q. At the time? A. I did, sir.

Q. Do you remember all that happened or would you like to refresh your memory? A. I think I remember.

20

Q. The parade consisted of how many men? A. Nine men, sir.

Q. This is the one at 9.30 p.m.? A. One-thirty p.m.

Q. And it included? A. The accused man, Maloney Gordon.

Q. Which one is that? A. That one over there, sir. (Witness points to accused Gordon)
They were all similar in dress, height, colour and general appearance.

30

Q. All nine men? A. All nine men.

- Q. Did you inform the accused of the purpose of the parade? A. I did sir.
- Q. What you told him? A. I told him that it was alleged that he is a party to the murder of Andrew Barton and that the witness would come on the parade and see if she could identify him.
- 10 Q. Did he make a request of you? A. He did, sir.
- Q. What? A. He requested that he wanted Mr. Gayle, Barrister-at-law, to represent him on the parade. This gentleman was called.
- Q. And did Mr. Gayle, the Barrister, attend? A. He did.
- Q. And did you tell him what were his rights? A. I did, sir.
- 20 Q. What you told him? A. I told him he had the right to name his place in the line; that also he had the option to change his clothes with anyone in the line.
- Q. Did he exercise his options? A. He did, sir.
- Q. What did he do? A. He occupied the position No. 4 to the left and he changed his clothes with No. 1 on the left, Clarence Nugent.
- 30 Q. When these things were being done, do you know where the witness was to come was? A. The witness was in another building, sir, out of sight and hearing.
- Q. And after the parade was formed was she brought on the parade? Was she summoned? A. She was summoned by telephone.
- Q. And did she come? A. She did.
- 40 Q. And on her arrival did you speak to her in the presence and hearing of the entire parade, in the presence and hearing of the accused? A. I did sir.

In the Supreme
Court

Prosecution
Evidence

No. 5

Winston Facey
Examination
(continued)

In the Supreme
Court

Prosecution
Evidence

No. 5

Winston Facey
Examination
(continued)

HIS LORDSHIP: Who is that? A. Camille Chung. I asked her if she knew what she was there for and she said to point out the man who shot Andrew Barton along the Palisadoes road on the morning of the 19th of February 1967.

HIS LORDSHIP: She said to point out the man who? A. Who shot Andrew Barton.

HIS LORDSHIP: Yes? A. Along the Palisadoes road on the 19th of February, 1967. I told her that she should walk along the line of men and if she saw the one she should touch him. She walked along the line and touched accused Gordon, saying, 'this is the one who had the gun'. Accused made no statement.

10

Q. The parade was dismissed? A. It was dismissed.

Q. You held another parade? A. I did, sir.

Q. How long after? A. At 2.15 p.m., sir.

Q. Do you remember who was on that parade? Did she point out anybody on that parade?
A. She did, sir.

20

Q. Who? A. One Edward Thompson

(Mr. Kerr sits)

Cross-
examination

Cross-Examination by Mr. Kirlow:

Q. Now, you knew that other people were involved in this Barton killing? A. No, I knew nothing of the facts of the case.

Q. It did not strike you as peculiar when this witness said to you that she was coming to pick out the man who shot Andrew Barton?
A. No it did not.

30

Q. She did not come to pick out one of the men who were on Palisadoes road that night? She did not say that? A. No, she did not.

Q. But she apparently knew before what she was coming to pick out, that it was the man who shot Andrew Barton? She knew precisely that is what she was coming there for? A. That is what she said.

- Q. How was she summoned? A. By telephone.
- Q. Where was this telephone? A. The telephone is in the lock-up - office of the lock-up.
- Q. How far from where this parade was held? A. That is about ten feet away.
- Q. It is an office -- that telephone is in an office? A. It is on a table in a part of the lock-up.
- 10 Q. Is it in a passage: in a lock-up; in a room? A. It is in a passage. It is in where you call the administrative side of the lock-up.
- Q. Is it a room? A. You could call it that.
- Q. Where was the parade held? Was it in that very room? A. No. The parade was held in a enclosed corridor.
- Q. What you mean 'enclosed'; on all sides? A. On all sides.
- 20 Q. Away from the telephone? You could stay and hear what was said on the telephone? A. No.
- Q. Now, after everybody was in line and arranged, that was when the telephone call was made? A. That is the time.
- Q. Who made the telephone call? A. We have a peep hole and we push aside the peep hole and tell the guard to call so and so.
- 30 Q. You don't know who made the call? A. We don't know who made the call.

CROSS-EXAMINATION BY MR. EDWARDS:

- Q. Inspector, let me just get this clear. When one goes to the lock-up one goes left to the office? A. That is so.
- Q. One steps on to a sort of platform and you go left to the office? A. That is so.

In the Supreme
Court

Prosecution
Evidence

No. 5

Winston Facey
Cross-
Examination
(continued)

Cross-
Examination

In the Supreme
Court

Prosecution
Evidence

No. 5

Winston Facey
Cross-
examination
(continued)

- Q. If you go right you go along the same platform and you come to where the cells are? A. That is correct.
- Q. There is a double door? A. Yes.
- Q. ... that can block off the entrance to the sort of open space between the female cells - right? A. That is correct.
- Q. Parades are usually held in this open space between the male block of cells and the female block of cells? A. There is no open space there. 10
- Q. in a space that is open when the doors are open? A. That is so.
- Q. But this space is closed off by the closing of the doors? A. That is correct.
- Q. Now, doesn't the door have a glass - a round glass - aperture? A. That is the peep hole we call it.
- Q. But it is made of glass? A. Yes.
- Q. How wide it is? A. May be about three inches square. 20
- Q. I would submit it is a little more than that you know. A. It is about that.
- Q. About that. Now, this is the procedure; isn't it? inside, the line is made? A. Yes.
- Q. And then after that line is made someone signals or give a signal to an officer on the outside of the door? A. That is correct.
- Q. And that officer then walks to the desk in the lock-up .. Am I right? A. That is correct. 30
- Q. A distance of about twelve, fifteen yards from the door? A. I don't think it is that far.
- Q. About how far? Show us from where you are. A. About from where I am to the two last benches there.

- | | | |
|----|--|--|
| | Q. That would make about how many yards?
A. Ten. | In the Supreme
Court |
| | Q. Ten yards. So one thing is clear Inspector
the prisoner inside where the identification
parade is held cannot hear what is said
over the telephone to the office? A. Can't
hear. | Prosecution
Evidence |
| | Q. Can't hear at all? And the prisoner cannot
see what signal is given through the glass
aperture? A. Yes he can see. | No. 5
Winston Facey
Cross-
examination
(continued) |
| 10 | Q. Isn't he put facing the wall that is just
around four feet ahead of him? A. Anything
happen there he can see. | |
| | Q. Just one minute. The prisoner is always
lined up against the wall to the west?
A. correct. | |
| | Q. And they face this passage which is only
around four feet wide? A. About that. | |
| 20 | Q. So if anyone, an officer, were to walk and
stand with his back to the west and give a
signal through the glass, the prisoner
couldn't see? A. He could see. | |
| | Q. What signal is given? A. He could see. | |
| | Q. Couldn't the body of the officer giving the
signal through the door prevent the
prisoner from seeing the person? A. There
is not enough space to give a signal, you
have to call to somebody. | |
| 30 | Q. It is always given verbally, no signal is
given? A. Quite sure. | |
| | Q. One thing is certain, the prisoner from
where he is standing by the wall cannot
look through the glass? A. He cannot. | |
| | Q. Is it customary for witnesses who come on
parades when there are several accused to
say exactly why she comes on the parade
for each accused? A. Well, you have to
ask her what she is there for, and she
tells you. | |
| 40 | Q. Wouldn't you have expected her to say
'I have come | |

In the Supreme
Court

Prosecution
Evidence

No. 5

Winston Facey
Cross-
examination
(continued)

MR. KERR: Objection there.

MR. EDWARDS: Now, Officer, she said, 'I come to pick out the man ... A. Yes.

Q. You gather from what she said what man she came to see?

MR. KERR: Objection there.

MR. EDWARDS: M'lud, I cannot see how my friend could object to this. I am asking what he gathered from what the witness said to him. I am asking what he learned from what she said. 10

HIS LORDSHIP: Yes Mr. Kerr, what is your objection?

MR. KERR: M'lud, the witness has given exactly what the lady said. My learned friend is asking if he knew that she knew who she was coming to point out. That is the gist of the question.

HIS LORDSHIP: If there is some partiality as to affect how the parade is held?

MR. KERR: I am not saying it is not relevant but what he is asking this witness is to interpret what the witness meant beyond the plain ordinary meaning of the word. 20

HIS LORDSHIP: We are only concerned with the relevance Mr. Edwards, and I presume you are attacking the fairness or unfairness of the parade. If your line of cross-examination is in fact interpreting something, you know that is not admissible. Anyway I am not stopping you, but bear that in mind.

MR. EDWARDS: Bearing that in mind M'lud, I will try to rephrase the question. Inspector, you said you knew nothing about this case? A. I had nothing to do with the investigation. 30

Q. You know later on that day the same witness is supposed to have attended another identification parade on another person? A. Yes.

Q. You merely asked her what she attended the parade for? A. That is all I did.

Q. So then, you didn't inform her why she had come on the parade? A. (No answer).

In the Supreme
Court

Q. You didn't inform her why she had come to the parade? A. She was to inform me why she was there.

Prosecution
Evidence

Q. You didn't inform her that she had come on the parade to identify a man who had shot at anyone? A. I couldn't tell her that.

No. 5

Winston Facey
Cross-
examination
(continued)

10 Q. You couldn't tell her because you knew nothing about it? A. I couldn't tell her that.

Q. It follows then that she brought the information into the identification parade?

MR. KERR: I object M'lord. That is a matter for address and deduction.

HIS LORDSHIP: I am afraid I cannot agree with you Mr. Kerr.

20 MR. EDWARDS: Let's be frank about it. You didn't tell her why she was there?
A. (No answer)

Q. No one told her why she was there, in your presence? A. No, sir.

Q. You were the only person who spoke to her? A. I was the only person who spoke to her.

Q. And you have told us all what you have said? A. I have.

Q. You have not left out anything? A. Nothing at all.

30 Q. And without your telling her she told you what she had come there to do? A. She did.

(Mr. Edwards sits)

RE-EXAMINATION BY MR. KERR:

Re-examination

Q. The officer who you asked to summon the witness by telephone, did that officer come inside the cell block? A. No, sir.

In the Supreme
Court

Prosecution
Evidence

No. 5

Winston Facey
Re-
examination
(continued)

Q. You spoke to him through this peep-hole you say? A. I did, sir.

Q. Did anybody else speak to him?
A. Nobody else.

Q. You said you gave him no signal? A. No signal.

Q. Did you see anybody giving him any signal?
A. Nobody gave him any signal.

Q. When all this was being done, was Mr. Gayle, the Barrister, there? A. He was there. 10

Q. Throughout the proceedings?
A. Throughout the proceedings.

Q. And did he raise any objection? A. No objection.

Q. This telephone that this officer used, you say was how far from the cell block?
A. Ten yards away.

Q. And where the witness was at the time was how far? A. She must have been about two chains away.

(Mr. Kerr sits) 20

HIS LORDSHIP: Yes Mr. Kirlew?

MR. KIRLEW: M'lord, I don't know if I would get the leave of the court to ask a few further questions in respect of the identification parade.

HIS LORDSHIP: Yes, go ahead.

Further
Cross-
examination

FURTHER CROSS-EXAMINATION BY MR. KIRLEW OF
INSPECTOR WINSTON FACEY:

Q. Now there was also another parade at 2.10?
A. Two-fifteen. 30

HIS LORDSHIP: Did you have one parade at 1.30?
A. Yes, M'lord.

Q. And the other? A. Two-fifteen, M'lord.

MR. KIRLEW: And the same procedure was followed? A. The same procedure.

Q. And the witness Chung came? A. Yes.

Q. And you spoke to her? A. Yes.

Q. What you said to her? A. I asked her a similar question.

Q. What you asked her? A. What she was there for.

Q. And what she said?

MR. KERR: One moment. M'lord, this, of course, was said in the absence of the accused. I don't want to stop my friend.

HIS LORDSHIP: This was on the second parade?

MR. KERR: Yes M'lord.

MR. KIRLEW: You remember which accused this was in respect of? A. Which parade?

Q. Which person. A. Edward Thompson.

Q. When Chung came you spoke to her? A. Yes, sir.

Q. What you said to her? A. I asked her if she knew what she was there for.

Q. What she said? A. She said she was there to point out a man who pulled a ring off her finger.

Q. Did anyone speak to her in your presence, anyone apart from yourself? A. No one else.

Q. So far as you know, no one in your presence spoke to her about which man was on parade? A. Nobody spoke to her.

(Mr. Kirlew sits)

HIS LORDSHIP: Yes, Mr. Edwards? Anything concerning this leave I have given to Mr. Kirlew on this aspect of it?

MR. EDWARDS: No, M'lud.

HIS LORDSHIP: Any re-examination on this aspect of it?

MR. KERR: No M'lord.

In the Supreme Court

Prosecution Evidence

No. 5

Winston Facey
Further
Cross-
examination

10

20

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In the Supreme
Court

NO. 6

REUBEN ROBERTSON

Prosecution
Evidence

REUBEN ROBERTSON: SWORN: EXAMINED BY MR. KERR:

No. 6

Reuben
Robertson
Examination

Q. Your name? A. My name, sir, is Reuben
Robertson, Detective Assistant Superintendent
of Police, C.I.D. Headquarters.

Q. Now, you remember the 17th of April, this
year? A. Yes, sir.

Q. Were you in possession of certain information?
A. Yes, sir. 10

Q. At about 8.45 a.m. did you go with a party of
Detectives to a certain place? A. Forty-six
Maxfield Avenue, Kingston.

Q. Did you go to any particular part of those
premises? A. Yes, sir, I went to a room which
is at the back of the premises.

Q. Did you see anyone there? A. Yes, sir, I saw
this accused there along with other persons.

Q. You know the name of the other person?
A. Garth Williams, sir. 20

HIS LORDSHIP: Which accused you are referring to?
A. The accused one sir, Dennis Barth.

MR. KERR: And did you take them into custody?
A. Yes, sir, I did.

Q. Where did you take them to?
A. I took them to the Flying Squad Office,
sir.

Q. You saw Dennis Barth in the room? A. Yes,
sir.

Q. You took him along 30
A. Him and some other persons I found there.

Q. And did you hand over the accused man to
Detective Sergeant Hanson? A. Yes, sir.

(Mr. Kerr sits)

MR. KIRLEW: No cross-examination please, M'lord.
MR. EDWARDS: No cross-examination M'lud.

JEZZ MARSTON

In the Supreme
Court

Prosecution
Evidence

No. 7

Jezz Marston

JEZZ MARSTON: SWORN: EXAMINED BY MR. KERR:

Q. Your name? A. Jezz Marston, sir, I am a Detective Deputy Superintendent of Police attached to C.I.D. Headquarters, Kingston.

Q. Now, on the 25th of April, this year, were you in possession of certain information?
A. Yes, sir.

10 Q. And as a result, did you go to certain premises? A. Yes, sir.

Q. What premises? A. Eighteen Swettenham Road.

Q. Is that in the parish of St. Andrew?
A. Yes, sir.

Q. About what time you got there? A. Six a.m.

Q. And in a room there did you see anyone?
A. Yes, sir.

Q. Who? A. The accused, Maloney Gordon.

Q. Anyone else with him? A. Yes, sir.

20 Q. Who? A. One Pusey and Edward Thompson and two girls.

Q. And did you take them into custody?
A. I did sir.

Q. And did you hand over the accused to Detective Hanson? A. I did sir.

(Mr. Kerr sits).

JEZZ MARSTON: Cross-examined by Mr. Kirlew:

Cross-
examination

Q. You were in charge of the investigation of this case? A. Yes, sir.

30 Q. Do you know one Howard Simmonds? A. No., sir.

Q. Now dead. You heard of him? A. I heard of him.

In the Supreme
Court

Prosecution
Evidence

No. 7

Jezz Marston

Cross-
examination
(continued)

Q. Did you happen to enquire into any shooting in connection with his death? A. No, sir.

Q. Did you see his body after he died?
A. No, sir.

Q. That is all M'lord.

(Mr. Kirlew sits)

MR. EDWARDS: No cross-examination M'lud.

HIS LORDSHIP: Any re-examination?

MR. KERR: Thank you Detective.

No. 8

Terrence
Hanson
Examination

NO.8

TERRENCE HANSON

10

TERRENCE HANSON: SWORN: EXAMINED BY MR. KERR:

Q. Now, is your name Terrence Hanson? A. Yes, sir.

Q. And are you a Detective Sergeant of Police?
A. Yes, sir.

Q. And are you stationed at Elletson Road in Kingston? A. Yes, sir.

Q. Now, on the 19th of February, this year, about 3.00 a.m., that is the Sunday morning, did you get a telephone call? A. Yes, sir.

20

Q. And as a result did you go anywhere?
A. Yes, sir.

Q. Where? A. On the Palisadoes road, sir, near to the number 8 mile post.

Q. That is in the parish of Kingston? A. Of Kingston, sir.

Q. And did you notice anything there? A. Yes, sir.

Q. What? A. On a gravel pathway about ten feet from the Palisadoes road I saw the body of a man.

30

Q. Which side was he on? A. It is on the eastern side of Palisadoes road, sir.

In the Supreme
Court

Prosecution
Evidence

No. 8

Terrence
Hanson
Examination
(continued)

- Q. That is on the left going towards the airport? A. No, Port Royal, sir.
- Q. And what was the position of the body?
A. It was lying on its back, head to the east, feet to the west; clothed in a pair of shorts, white, long sleeve white 'ghanzi', one foot of a pair of white canvas shoe on the left foot and a white sock. About eighteen feet away from the body I saw another foot of white canvas shoe and near to this canvas shoe I saw a gents' wrist watch, the band broken and the glass also broken. About twelve feet away from the body I saw a red 'M.G.' Sports car parked. I examined the body and I saw blood on the left breast. Near to the pocket there was a hole in the 'ghanzi' at this spot. The man appeared to be dead.
- 10
- Q. Did you see Camille Chung out there?
A. I saw her later that morning, sir. I then established the name of the dead man to be Andrew Barton. I contacted Dr. Martin and he gave me certain instructions. I also contacted the Police Photographer.
- 20
- Q. What happened to the body now? A. It was eventually removed to the public mortuary in Kingston and later that same day I attended a post mortem examination performed by Dr. Martin on the body of Andrew Barton.
- 30
- Q. And the body was identified there by Allan Barton? A. Allan Barton, uncle of the deceased.
- Q. Was the clothes taken off the deceased man?
A. Yes, sir.
- Q. And was handed to you? A. Yes, sir.
- Q. Is this the shirt and the trousers the man had on (Shirt and shorts shown to witness).
A. This is the shirt, sir.
- 40
- Q. And this is the pair of white shorts?
Exhibit 1 M'lord. A. Yes, sir. (Watch shown to witness) This is the wrist watch I found, sir. It is now as I found it.

In the Supreme
Court

Prosecution
Evidence

No. 8

Terrence
Hanson
Examination
(continued)

- Q. Was it working when you saw it? A. No.
sir.
- Q. Did you look at the time on it? A. Yes, sir,
it was sixteen minutes after two.
- Q. Now you were present, you say, at the post
mortem? A. Yes, sir.
- Q. And did the Doctor do anything? A. Yes,
sir.
- Q. What? A. He opened the chest cavity of the
deceased man, and he removed from it a spent
bullet. 10
- Q. What he did with it? A. I took it and placed
it in a phial. I sealed it in the presence
of the Doctor, and I marked it.
- HIS LORDSHIP: You took it from the Doctor?
A. Yes, sir, and I put it in a bottle. I
marked it "A" (Phial shown to witness)
Doctor Martin initialled and dated it.
- MR. KERR: Is that the phial? A. This is it, yes
sir. He also handed me another bullet, spent
bullet taken from the body. 20
- Q. Which part was it taken from? Do you know?
A. Yes, sir, it came from the lower portion,
sir, from one of the legs.
- Q. He saw what you did with it? A. I put it in
this bottle, sir, and marked it "B". It was
initialled and dated by the Doctor.
- Q. Now, on the 2nd of March, did you take these
bullets along together with the shirt to Mr.
Jack Morris, Ballistic Expert? A. Yes, sir,
but before that I had sealed them. 30
- Q. And you took it to him? A. Yes, sir, and I
handed them over to him. He carried out a
test on the shirt that same day.
- Q. You saw that? A. Yes, sir, I saw it and he
handed it back to me that same day.
- Q. What about bottles "A" and "B"? A. I left
them with him, sir, and they were returned to
me some time after, I don't remember the date.

HIS LORDSHIP: You left the bottles?
A. I took the bottles to him, sir.

HIS LORDSHIP: And he handed you back?
A. He handed me the shirt and the pair of shorts that very day, sir.

MR. KERR: You gave him the shorts and the shirt? A. Yes, sir.

HIS LORDSHIP: Later he gave you back the bottles? A. Yes M'lord.

In the Supreme
Court

Prosecution
Evidence

No. 8

Terrence
Hanson
Examination
(continued)

10 MR. KERR: Look in bottle "A", look in it (witness complies) A. This is the bullet that Doctor Martin handed me, which I saw him remove from the chest cavity of Andrew Barton.

Q. I beg to tender the bottle and bullet, Exhibit 3, M'lord. Bottle "B" A. This also, sir, bullet taken from the body of Andrew Barton and handed to me at the post mortem examination.

20 Q. I beg to tender it as Exhibit 4, M'lord. Now, on the 17th of April, did you arrest the accused man, Dennis Barth? A. Yes, sir.

Q. Where you saw him? A. At the Flying Squad Office, C.I.D., Kingston.

Q. What did you arrest him for? A. I arrested him for the murder of Andrew Barton. I cautioned him.

Q. About what time you arrested him? A. A few minutes after 10.00 a.m., sir.

30 Q. What you said you did? A. I cautioned him after I arrested him.

Q. Did he say anything? Answer yes or no. A. Yes, sir.

In the Supreme
Court

NO.9
PROCEEDINGS

No. 9
Proceedings
20th November
1967

MR. KIRLEW: M'lord, I am objecting to the answer that was made.

HIS LORDSHIP: Yes, you want it gone into?

MR. KIRLEW: To be excluded, sir, in that Maloney Gordon was not present when this answer was given. It is not evidence against him, and the only effect would be a prejudicial one. Page 19, M'lord, middle of the page.

10

HIS LORDSHIP: Yes, you say that the other accused was not there?

MR. KIRLEW: No, sir.

HIS LORDSHIP: Anything else?

MR. KIRLEW: And the effect would only be a prejudicial one so far as Maloney Grodon is concerned, nor does it advance the case any further against Barth so far as the crown is concerned.

HIS LORDSHIP: It has no probative value so far as your man is concerned. That is what you are objecting to? I want the reasons for your objection. One: the other accused was not there, so it is not evidence against him. Two: If it concerns your client, it has no probitive value. Anything else?

20

MR. KIRLEW: In respect of the other accused it has no value either.

HIS LORDSHIP: I want to know the reasons, the arguments, which perhaps would be joined between the two of you. I would prefer to have the jury absent.

30

MR. KIRLEW: It has no probative value in respect of Maloney Gordon or in respect of the other accused. It is my submission that it has no probitive value in respect of Gordon or the other accused.

HIS LORDSHIP: I have to hear both sides. I have to listen to both sides. I prefer the jury to

be absent. Do you object to the evidence?

In the Supreme
Court

MR. EDWARDS: I join my learned friend in his objection M'lud.

—
No. 9

HIS LORDSHIP: Yes Mr. Kerr, the position is this: do you join issue or do you concede?

Proceedings
20th November
1967
(continued)

MR. KERR: I join issue M'lord.

10 HIS LORDSHIP: I am afraid you will have to have the jury taken to the jury room so it can be gone into. Members of the Jury, there will be certain submissions which I have to listen to and, perhaps, give my ruling. Meantime, whilst that is going on you will be retired to your jury room and you will not discuss the matter.

Jury taken to jury room under sworn guard
3.00 p.m.

HIS LORDSHIP: Yes Mr. Kirlew? You want to develop your argument?

20 MR. KIRLEW: Let me then recap, One: The answer given is one which tends only to implicate the accused, Maloney Gordon, but he was not present at the time when this answer was given. So as far as being evidence against him it is really inadmissible, and the admission of such evidence would only have a prejudicial effect on the accused, Maloney Gordon.

30 On the other hand, so far as carrying the case further in respect of Barth, the answer does not carry the case any further where Dennis Barth is concerned because all it adds up to is a denial by Barth.

HIS LORDSHIP: Doesn't it carry it further, as far as the other accused is concerned, away from him?

MR. KIRLEW: I say, as far as the crown is concerned.

40 HIS LORDSHIP: Is that not relevant? In other words at that time he is protesting his innocence.

In the Supreme
Court

No. 9

Proceedings
20th November
1967
(continued)

MR. KIRLEW: Yes M'lord, that is relevant.

HIS LORDSHIP: But is it good enough? What are you suggesting, it is not good enough?

MR. KIRLEW: What I am saying M'lord -- I put it this way, sir, that if we weigh the effect of it as far as Barth is concerned the prejudicial effect that it will have - the prejudicial effect far outweighs the prohibitive effect it will have, as far as Barth is concerned. So I am asking M'lord, that the witness be not permitted to give that answer.

10

HIS LORDSHIP: Are those your grounds?

MR. KIRLEW: Those are the grounds, sir.

HIS LORDSHIP: You do not want any evidence to support your grounds?

MR. KIRLEW: No, sir, I don't think

MR. EDWARDS: May it please you M'lud, I will support my learned friend and ask Your Lordship to look at page 19, the same paragraph M'lud, just two lines above that - that is four lines from the bottom for the paragraph beginning "On the 17th April, 1967..". M'lud, I am wrong, I thought that "Howie charged with murder here, sir", that was said by Barth; that was said by Williams.

20

HIS LORDSHIP: You are referring to the one said by Barth?

MR. EDWARDS: Yes M'lud. My position in this case at the moment is this: No witness for the crown has placed me anywhere near the scene of the firing - near the gun.

30

HIS LORDSHIP: Near Barton?

MR. EDWARDS: Near Barton when it was fired. So M'lud, I would not be handicapped in any way if Barth said nothing on arrest. At a later stage, M'lud, I intend to make a certain approach

HIS LORDSHIP: You didn't telegraph your message, you are fully aware.

40

10 MR. EDWARDS: I am saying, M'lud, that Barth does not stand to suffer in any way by an exclusion of this statement, and I agree with my learned friend that this statement is completely prejudicial to Maloney Gordon, and I belong to the school of thought, M'lud, that where something prejudicial is said that has no probitive value no amount of direction by the learned trial judge can erase that statement from the minds of the jury, M'lud. May I point out, M'lud, that I am in very good company as in *The Queen vs. Fitzpatrick*, a case that Your Lordship knows, 1943, 3A E.R. at page 840, this principle was relied on. It is not exactly a point M'lud, but I think it is sufficiently a point for me to cite it.

HIS LORDSHIP: Harris is a better authority.

20 MR. EDWARDS: It is a better authority, but I could not remember the reference M'lud. Your Lordship is aware of the point that you have power to decide even when a thing is relevant to exclude it because it has more prejudicial than probitive value.

HIS LORDSHIP: You will agree that it is relevant where Barth is concerned?

MR. EDWARDS: Yes, sir, it is relevant, but I am saying I will not be prejudiced.

30 HIS LORDSHIP: Don't count your chickens before they are hatched.

MR. EDWARDS: I can say, M'lud, that hatching is in process, M'lud.

40 MR. KERR: M'lord, the foundation for asking this evidence to be admitted rests upon a very simple ground. There is no doubt, M'lord that the evidence is relevant, and the question is whether or not Your Lordship should exercise your discretion one way or the other. It is also conceded, M'lord, that this would not be evidence against Maloney Gordon, but it is evidence against Barth in that from it may be inferred presence at the scene and knowledge of the shooting.

In the Supreme
Court

No. 9

Proceedings
20th November
1967
(continued)

HIS LORDSHIP: How can you say that? "You cannot charge me for murder, sir, a Maloney shoot the man".

MR. KERR: It certainly shows he had knowledge of it, and the crown's case is common design, and the only question, M'lord, is whether the prejudicial effect to Maloney outweighs the probitive value against Barth. - entirely a matter for Your Lordship's discretion. That is the narrow foundation on which I am asking for this evidence to be admitted.

10

HIS LORDSHIP: Yes, any answer - any replies?

MR. EDWARDS: On this point my learned friend says that it is relevant on the common design point; with that I will join strong issue with my learned friend. I am sure Your Lordship is aware of the case of Anderson and Morris, 1966, 2A E.R., at page 644, the Jamaican case of Mandro and Graham and Wesley Scott shows that presence when a certain act is done is not evidence of common design, the same thing as in King vs. The Queen - a Trinidad case

20

The fact that we are supposed to have an idea is not evidence of common design and does not link in Barth at all. I did know that my learned friend was going to approach it from this point of view but I don't think that his suggestion in law is well based.

30

HIS LORDSHIP: Yes, I take it for granted the evidence has not yet been given before the court in the absence of the jury and that is what this statement is. But I take it for granted that that statement would be what is referred to at page 19 of the copy of the depositions, and I quote "You can't charge me for murder, sir, a Maloney shoot the man". Well, it is obvious that it is not any statement implicating the accused Gordon for he was not there and if he were there the crown would have to go further and prove that he adopted it or there was more or less tacit acquiescence so far as the statement concerned him.

40

The evidence is that Gordon was not there. Now the relevancy of that statement is,

10

so far as the accused Barth is concerned, is that he is more or less protesting his innocence. Well, as I see it, unless that statement is edited, that is, you stop at the word "sir", it certainly is prejudicial against Gordon, and the statement obviously is not evidence against Gordon. So the relevancy of that statement, even if it is said, would be that the accused, Barth, is protesting his innocence and at the same time, if it is un-edited, and continued to say "a Maloney shoot the man", for it to be evidence of common design and to be relevant on that aspect of it as a statement made against a person in his absence in which he had no opportunity for saying yes or no to that statement - so then that the probitive value is negligible but the prejudicial value is very high indeed, and as such I have no alternative, according to the authorities, but to exercise my discretion which must be along judicial lines and that is to exclude the statement from the evidence. Yes call back the jury.

20

Jury return 3.16 p.m.

Registrar takes jury roll call

HIS LORDSHIP: Yes Mr. Kerr?

30

MR. KERR: M'lord, other issues of admissibility, I understand, will arise in this case. Perhaps it seems a convenient time to send away the jury while these legal arguments are ventilated.

HIS LORDSHIP: Well, you see, the only trouble is, you will have to lay down certain foundations with regards to voluntariness or not, then, perhaps, we will look into that. They can be here for that part of the evidence.

40

MR. KERR: In any event it would still have to be gone over again, if necessary.

HIS LORDSHIP: Until you come to the objection to admissibility you will have to lay down certain foundations before the jury.

In the Supreme
Court
Prosecution
Evidence

NO.10

TERRENCE HANSON (continued)

No.10

CONTINUATION OF EXAMINATION OF TERRENCE HANSON
BY MR. KERR:

Terrence
Hanson
Examination
(continued)

Q. What you said, you arrested this man just a couple of minutes after 10.00 a.m? Now after arrest did you engage in doing certain processing? A. Yes, sir.

Q. And while you were doing that did the accused man, Barth, speak to you? A. Yes, sir.

10

No.11

Proceedings
20th November
1967

NO.11

PROCEEDINGS

MR. KIRLEW: M'lord, I would like also to make an objection at this state as to what follows.

HIS LORDSHIP: All right, I see what you mean Mr. Kirlew. In any case you prefer to have the matter argued now.

MR. KIRLEW: Yes, M'lord.

HIS LORDSHIP: In the absence of the jury?

MR. KIRLEW: Yes, M'lord, I don't think it will be very long.

20

HIS LORDSHIP: Yes, perhaps Mr. Kerr it is better to heed your advice for what I see stated here could be just as effective. Yes, we will have to send away the jury again.

MR. KERR: M'lord, perhaps before we are through with this the day may be well spent. Perhaps it would be convenient to send home the jury at this stage.

HIS LORDSHIP: Any objection Mr. Kirlew?

30

MR. KIRLEW: None please, M'lord.

HIS LORDSHIP: Mr. Edwards?

MR. EDWARDS: None, please, M'lud.

HIS LORDSHIP: Mr. Foreman and Members of the Jury, now that you are refreshed with drink and water I am happy to tell you that we will take the adjournment now until tomorrow morning when we will continue with the hearing of this case. In the meantime, do not discuss the matter among yourselves and do not allow anyone to influence you.

TIME 3.22 p.m.

In the Supreme Court

No.11

Proceedings
20th November
1967
(continued)

21st November
1967

10 Tuesday, 21st November, 1967

Jury Roll Call. All present.
Det. Sgt. Terrence Hanson sworn.

HIS LORDSHIP: Yes Mr. Kerr?

20

MR. KERR: May it please you, M'lord, when we adjourned yesterday issue was joined regarding the admissibility of a certain conversation. M'lord, on reflection having regard to the position in which Camille Chung placed the accused man, Barton, and having regard to a certain amount of similarity between this evidence and what went on yesterday, I will not press it.

HIS LORDSHIP: Press what?

MR. KERR: I will not press to have this evidence admitted.

HIS LORDSHIP: Yes, in that case then we continue. That is the end of the witness' examination-in-chief?

30

MR. KERR: No, M'lord.

(Mr. Edwards stands)

HIS LORDSHIP: You want to say something?

40

MR. EDWARDS: There is yet another course that can be taken in regard to that conversation Your Lordship knows what I am referring to. M'lord I think it is wise to say the conversation that was taken down in writing, and that is a matter of editing. I am now of the opinion, M'lord, that I would like editing to take place, M'lord and if Your Lordship will allow me in the absence of

In the Supreme
Court

No.11

Proceedings
21st November
1967
(continued)

the jury to explain myself thoroughly.
I will explain to Your Lordship why I have
this point of view.

HIS LORDSHIP: Yes, Mr. Kerr? He would like
the jury to be out to still continue the
enquiry on certain other matters.

MR. KERR: Yes M'lord.

HIS LORDSHIP: It is suggested at this stage to
keep the jury in the jury-room.

MR. KERR: As Your Lordship pleases. 10

HIS LORDSHIP: I think it will be better in the
circumstances. Members of the Jury, I still
have some further arguments to be addressed
to me and I will make my ruling one way or
the other. In the meantime you will retire
to the Jury-room under guard and you will not
discuss this matter.

JURY RETIRE TO JURY-ROOM UNDER SWORN
GUARD - 10:10 a.m.

MR. EDWARDS: May it please you, M'lord, I wish 20
to refer to the case of the Queen against.....

HIS LORDSHIP: On what point?

MR. EDWARDS: On the point of 'Editing', M'lord.
May I just say this, if Your Lordship will
look at page 23 in typescript Your Lordship
will there see a statement by Dennis Barton
and Your Lordship will see that the statement
- I don't know if Your Lordship wishes me to
read it - but the last sentence

HIS LORDSHIP: You are objecting to the 30
admissibility of that editing of that
statement?

MR. EDWARDS: No, M'lord. I am saying that I
would like the statement to go in provided
the last sentence in the statement is expunged.

HIS LORDSHIP: Which sentence is that?

MR. EDWARDS: The last two sentences beginning from
"After".

HIS LORDSHIP: And up to where? "Look" or "them"?

In the Supreme Court

MR. EDWARDS: "After" to "them".

No.11

HIS LORDSHIP: To "them"?

Proceedings
21st November
1967
(continued)

MR. EDWARDS: Yes, M'lord.

HIS LORDSHIP: All right, let me just make a note. So that you would not be objecting to that statement going in evidence before the jury provided you want that part of the statement expunged?

10

MR. EDWARDS: Yes.

HIS LORDSHIP: Your authority to your submission is.... First of all, before we get to that, what about you Mr. Kirlew?

MR. KIRLEW: M'lord, my objection was that the whole statement should have been kept out. That was my objection. And the reason for it was that the last three sentences, not the last sentence, "After we ride away" starting from there.....

20

HIS LORDSHIP: Well, Mr. Kirlew, you are objecting to your statement going in evidence?

MR. KIRLEW: Not my statement, sir the statement of Dennis Barton. I was objecting to Dennis Barton's statement going in because it is prejudicial against my client.

HIS LORDSHIP: Now, what about the statement of Gordon?

MR. KIRLEW: I am not objecting to that, M'lord, and if I may, M'lord, the portions of Barton's statement that I object to are the last three sentences in the statement itself, starting, "After we ride away.."

30

HIS LORDSHIP: And if those are expunged.. ?

MR. KIRLEW: I would have no objection.

HIS LORDSHIP: So if those are expunged you would have no objection?

In the Supreme
Court

No.11

Proceedings
21st November
1967
(continued)

MR. KIRLEW: I would have no objection.

HIS LORDSHIP: And you have no objection to any of the statement going in except for that part in Barton's statement?

MR. KIRLEW: Yes M'lord.

HIS LORDSHIP: So your ground, Mr. Kirlew, is that of it being prejudicial, that part of the statement being prejudicial to your client, not on any question of voluntariness of the statement?

10

MR. KIRLEW: No, M'lord, I wasn't objecting on that ground at all.

HIS LORDSHIP: Merely on the question of the prejudicial effect of the statement, that part of the statement?

MR. KIRLEW: Yes M'lord, that part.

HIS LORDSHIP: Now, Mr. Edwards, as I understand it too, you are not questioning the voluntariness of the statement?

MR. EDWARDS: No M'lord.

20

HIS LORDSHIP: Except the prejudicial effect?

MR. EDWARDS: Yes M'lord.

HIS LORDSHIP: Yes, now that we have cleared the air - Mr. Kerr, now that we have cleared the air, what terms of reference the court would have? What is your attitude respecting that aspect of the statement of Barton?

MR. KERR: M'lord the first thing is that I have decided not to offer the statement in evidence at all. That is the decision that I have come to and I am not offering the statement in evidence at all, none of the conversation in evidence.

30

HIS LORDSHIP: Conversation? We are referring to the statement.

MR. KERR: Both, neither the conversation nor Barton's statement. I am not offering it in evidence at all. From there, M'lord, I submit.....

HIS LORDSHIP: No, I was under the impression at first....

In the Supreme
Court

MR. KERR: I had decided to, M'lord, but on re-examination, as I said this morning, I will not pursue the matter.

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Proceedings
21st November
1967
(continued)

HIS LORDSHIP: Both as to the conversation and as to the statements?

10 MR. KERR: Both, M'lord. I will not pursue the matter both of the conversation and the statement which he gave subsequent to that conversation will not be pursued. And I make this point, M'lord...

HIS LORDSHIP: Well, I don't know, it is your case you will know best. You need not give me any reason.

MR. KERR: Yes, M'lord.

HIS LORDSHIP: So then, the question of the voluntariness and prejudicial effect ...

MR. KERR: Do not arise.

20 HIS LORDSHIP: do not arise.

MR. KERR: Yes M'lord.

HIS LORDSHIP: Is there any other argument?

MR. EDWARDS: There is nothing more I can do. All I can say is touche!

JURY RETURN UNDER SWORN GUARD - 10.24 a.m.

JURY ROLL CALL. All present.

In the Supreme
Court

NO.12

Prosecution
Evidence

TERRENCE HANSON (continued)

No.12
Terrence
Hanson
Examination
(continued)

Mr. KERR: Yes, Mr. Hanson, did you subsequently arrest the accused man, Gordon? A. Yes sir.

Q. Do you remember when? Was it the 29th of April? A. The 29th of April, 1967.

Q. This year? A. 1967.

Q. For what offence you arrested him? A. On the charge of murder.

HIS LORDSHIP: When?

A. 29th of April, 1967, M'lord.

10

MR. KERR: Where did you arrest him? A. At the Flying Squad Office, C.I.D. Headquarters in the parish of Kingston.

Q. Now, about what time this morning of the 19th of February, did you get out to the Palisadoes Road? A. About 3.35 in the morning, sir.

Q. And what was the visibility like out there when you got there? A. Well, I could see clearly, sir.

20

Q. What you mean by that? A. Well, the moon was shining, sir, and that supplied sufficient light for me to see clearly the surroundings around the body of the deceased.

Q. Now you know - Look at that shirt again. (Shirt shown to witness) When you saw the accused, how was he lying? A. The deceased sir?

Q. The deceased, sorry. A. He was lying on his back, sir. (Witness examines shirt).

Q. And he had on that shirt? A. Yes sir.

30

Q. Were blood-stain and a hole in it? A. Blood-stain and hole in it.

Q. What about the trousers? (Shown to witness) A. He was wearing this trousers too, sir.

Q. Yes? A. When I went there, when I first saw him I did not see this blood-stain because he was lying on it.

Q. I see. When first did you see it?
A. It was when the body was being removed into the ambulance, sir, the undertaker's car.

Q. Is there any damage to that trouser?
A. Yes sir. There is a hole in the spot where the blood is, sir.

HIS LORDSHIP: Yes?

10 MR. KERR: Do you know Edward Thompson? A. Yes sir.

Q. In physical appearance, how does he compare with Maloney Gordon? A. Well, he is younger, a shade clearer, smaller in stature, also in height, he is shorter than the accused Gordon, sir.

Q. What about Garth Williams? A. He is fairer than Gordon, shorter, around the same build, sir and I would say slightly younger than Gordon.

20 HIS LORDSHIP: You say fairer or shorter?
A. Shorter, M'lord. Nearly around the same build and slightly younger, M'lord.

HIS LORDSHIP: Yes?

MR. KERR: Now, when you arrested Gordon, was he the same build as he is now? A. No sir, he was slimmer then. He has put on weight since.

(Crown counsel sits).

HIS LORDSHIP: Yes, Mr. Kirlew?

30 CROSS-EXAMINATION BY DEFENCE COUNSEL, MR.
KIRLEW:

Q. You are sure about seeing the moon that night?
A. Yes sir, there was moon shining; stars were all there in the sky.

Q. No, we are dealing with the moon for the time being. A. Yes sir, there was moonlight.

Q. Where in the sky you saw the moon? A. Up in the sky.

In the Supreme
Court

Prosecution
Evidence

No.12

Terrence
Hanson
Cross-
examination
(continued)

- Q. Where? It could be the eastern sky, western sky or in between? A. I didn't pay particular attention to what part of the sky the moon was in but I know it was there shining that morning.
- Q. I suggest that there was no moon at that hour? A. Well, I saw moonlight sir.
- Q. You remember whether it was a full moon, or half moon or quarter moon or what? A. No sir, I don't remember. 10
- Q. You don't remember all that? A. I don't remember.
- Q. You remember seeing the light from the moon? A. Yes, I remember it was moonlight I saw.
- Q. Now, do you know one Howard Simmonds? A. Yes sir.
- Q. He is dead now? A. Yes sir.
- Q. You have any pictures of him in your files in the C.I.D. office, you have any picture of him? A. There is a photograph of his dead body. I do not have it. 20
- Q. Is it in the C.I.D. office? A. I don't know where it is.
- Q. You couldn't produce it by any chance? A. It might take some doing, sir.
- Q. But it could be produced? A. It could.
- Q. You know what - first of all, did you know him when he was alive? A. Yes sir.
- Q. Did you know what his complexion is? A. I know his complexion. Dark in complexion. 30
- Q. His height? A. Yes sir, he was about five feet eight and a half to five feet nine.
- Q. Slim build or stout? A. Well, he wasn't stout.
- Q. Wasn't stout? A. No sir.

Q. Medium build, slim? A. I prefer to compare him with an individual. You have various stages of medium size.

Q. I agree with you. Now, who would you compare him with? A. Well, I would say he was stouter than the accused, Maloney Gordon.

Q. How much stouter? A. Fairly stouter.

10 Q. I am suggesting that that man was about the same size as Maloney Gordon. A. No sir. I knew them both; they were not alike in size.

Q. This man was found shot dead, I suppose, Simmonds? A. Well, I saw his dead body.

Q. You don't know how he came to be shot? You wouldn't know that? A. Well, I made some inquiries into it, sir.

Q. All right we won't go into that.

(Mr. Kirlew sits)

20 MR. EDWARDS: No cross-examination, M'lord.

HIS LORDSHIP: Any re-examination?

MR. KERR: Yes M'lord.

RE-EXAMINATION BY MR. KERR:

Re-
examination

Q. Now, do you have any idea when Simmonds died? A. Yes sir.

Q. What time? A. He died on the 5th of March 1967.

(Crown Counsel sits)

30 HIS LORDSHIP: Yes, stand down. (Witness stands down)

MR. KERR: M'lord, in view of an expression of non-opposition from my learned friend I propose to recall Detective Robertson.

HIS LORDSHIP: Yes, Detective Robertson.

In the Supreme
Court

NO.13

Prosecution
Evidence

REUBEN ROBERTSON (Re-called)

No.13

Reuben
Robertson
(Re-called)
Examination

DETECTIVE REUBEN ROBERTSON: RE-CALLED: SWORN:
EXAMINED BY MR. KERR

My name, sir, is Reuben Robertson.

Q. Now, on the 29th of April, this year at about 8.30 a.m. where were you? A. I was at the Flying Squad Office.

Q. And did you receive certain information?
A. Yes sir. 10

Q. And as a result did you go anywhere? A. Yes sir, I went to the cells at the Central Police Station.

Q. Did you see anyone there? A. Yes sir, I saw Maloney Gordon in one of the cells, sir.

Q. Was there talking between you? Was there talking between the two of you?
A. Yes sir.

Q. Who spoke first? A. He spoke first.

Q. What he said? A. He said, "Mr. Rob, me never shoot Barton". 20

HIS LORDSHIP: Said what? A. "Mr. Rob..."

HIS LORDSHIP: Yes? A. "Is Howie do it".

MR. KERR: Yes? A. Take a statement 'bout what I know".

Q. Yes? A. I cautioned him, sir.

Q. Yes? A. He said after he was cautioned, "Me want to give a statement".

HIS LORDSHIP: Want what? A. "Me want to give a statement". I took him out the cell, sir took him to the Flying Squad Office and telephoned one Mr. Aston Hamilton, a Justice of the Peace, and spoke to him. 30

Q. And did Mr. Hamilton come to the station?
A. He arrived there about ten minutes later, sir.

In the Supreme
Court

Q. In Mr. Hamilton's presence, did you speak to Gordon? A. Yes sir, in Mr. Hamilton's presence I told Gordon that Hamilton is a Justice of the Peace.

Prosecution
Evidence

No.13

Q. Yes? A. I then told Mr. Hamilton....

Reuben
Robertson
(Re-called)
Examination
(continued)

10

Q. In the presence and hearing of the accused?
A. of Gordon that Gordon is a prisoner charged with murder and he said he wanted to give a statement about the murder. Immediately.....

HIS LORDSHIP: All right. Yes? A. .. after I finished speaking, sir, Gordon said, "Inspector, me nah badah mek no statement".

HIS LORDSHIP: "Me nah..?"

A. "Me nah badah mek no statement".

20

MR. KERR: Did Hamilton then leave? A. Mr. Hamilton then left, sir.

30

Q. Yes? A. And while I was taking Gordon back to the cell, sir, on reaching a certain section of the passage up the stairs, the Flying Squad, he said to me, "Look yah, sir, me nuh shoot a soul. "Call the Justice mek me give me statement". I took him back to the office, Flying Squad Office, sir, and again telephoned Mr. Hamilton and spoke to him and he arrived about eight - between eight and ten minutes later, sir. On his arrival, sir, in the presence and hearing of Gordon, I told Mr. Hamilton that Gordon said that he wants to give the statement. Mr. Hamilton asked Gordon if that was so and Gordon said, yes. Mr. Hamilton asked Gordon if anyone was forcing him to give a statement. Gordon said, "Nobody not forcing me, nobody not forcing me to do it. Me never like you colour. You a brown man".

40

HIS LORDSHIP: "Nobody forced me to do it"?

A. Yes sir. "Me never like you colour".

HIS LORDSHIP: "Me never like you colour?"

A. Yes sir, "You a brown man", that is what Gordon said to Mr. Hamilton. After he was

In the Supreme
Court

Prosecution
Evidence

No.13

Reuben
Robertson
(Re-called)
Examination
(continued)

finished speaking, sir, I wrote down the caution on a sheet of foolscap paper and explained it to Gordon; then read it to him; asked him if he understood it. He said, yes. I invited him to sign his name, which he did and it was witnessed by Mr. Hamilton. I then told Gordon that he is at liberty to write the statement himself or if he wants anybody else to write it. He said that I can write it. I wrote a certificate to this effect, read it to Gordon, asked him if he understood it. He said, yes. I invited him to sign it. He did so, sir, and it was witnessed by Mr. Hamilton. Gordon then dictated a statement, sir, which I wrote down as he dictated, in his own words. After he reached a section, sir, he said he was finished, he had nothing more to say. I handed him the statement and told him to read it himself. He handed it back to me and told me to read it. I did so, sir, and while reading the statement, sir, he made certain corrections which he initialled - which I invited him to initial, and they were also initialled by Mr. Hamilton. After I had finished reading the statement I asked him to sign each and every page. He did so, sir. They were witnessed by Mr. Hamilton who signed his name. I finished there, sir.

10

20

MR. KERR: Now, did you append a certificate of having taken this statement? A. I did so, sir.

30

Q. The time in which it was taken? A. Yes sir.

Q. Did you sign that certificate? A. Yes sir.

Q. Now, did you threaten this man to make any statement? A. No sir.

Q. Did you hold out any promise and/or inducement to him? A. No sir.

Q. You used any force or influence on him? A. No sir.

Q. To your knowledge, did anyone force him to make a statement? A. No sir, not to my knowledge.

40

Q. Do you know if at that time he had already been arrested? A. Yes sir.

Q. And charged? A. I know he was charged.

In the Supreme Court

Q. And this was on the 29th of February?
A. Yes sir.

Prosecution Evidence

Q. Could you show the witness the statement please?

No.13

(To His Lordship) May the Statement be marked "5" for identity, M'lord?

Reuben Robertson (Re-called) Examination (continued)

(Statement shown to the witness)
A. Yes sir, this is the statement.

10 CROSS-EXAMINATION BY DEFENCE COUNSEL, MR. KIRLEW:

Cross-examination

Q. I am going to ask you a few questions.

HIS LORDSHIP: Is it all right....?

MR. KERR: Only for identity, sir.

MR. KIRLEW: Did you take down precisely what the accused told you? Did you paraphrase anything in your own words? A. In his own words. I wrote as he dictated.

20 Q. So you say everything you wrote down is exactly as he dictated? A. To my best knowledge and belief, sir.

Q. You didn't leave out anything? A. Not to my knowledge.

Q. You didn't add anything? A. No sir.

Q. That is all, M'lord.

HIS LORDSHIP: Yes, Mr. Edwards?

MR. KIRLEW: No cross-examination by Mr. Edwards.

HIS LORDSHIP: Any re-examination?

30 MR. KERR: No M'lord. The voluntariness of the statement not having been challenged, M'lord, I beg to tender the statement as Exhibit 5.

HIS LORDSHIP: Yes, Mr. Kirlew, any objections?

In the Supreme Court

Prosecution Evidence

No.13

Reuben Robertson (Re-called) Cross-examination (continued) Re-examination

MR. KIRLEW: No, M'lord.

HIS LORDSHIP: Statement tendered as Exhibit 5. The witness must read the statement.

(Witness reads Statement of Accused, Maloney Gordon)

MR. KERR: M'lord, may I put two questions by permission?

RE-EXAMINATION BY MR. KERR:

Q. Detective, do you know to whom reference is made as "Little Junior"? A. No sir, I do not know. 10

Q. Do you know to whom reference is made as "Copper"? A. Yes sir.

Q. Who is "Copper"? A. Garth.

Q. Who? A. I mean Barth is called "Copper".

HIS LORDSHIP: Barth? A. Is called "Copper".

HIS LORDSHIP: You don't know to whom reference is made of "Little Junior"? A. No sir.

HIS LORDSHIP: But you know that the accused Barth is referred to as "Copper". A. As "Copper". 20

HIS LORDSHIP: Mr. Kirlew, in view of the fact that the statement is now read and he has now been examined in chief, you can ask him any questions in regard to the statement.

MR. KIRLEW: As Your Lordship pleases.

Cross-examination

FURTHER CROSS-EXAMINATION BY DEFENCE COUNSEL, MR. KIRLEW:

Q. Just one or two questions. Now, in that statement where the accused said, "We search the man"...' (Witness examines statement) A. Yes sir. 30

Q. Now, are you sure that is what he said? or, 'we searched the beach?' A. No. I am quite sure.

Q, He said 'the man?' A. Yes.

In the Supreme Court

Q. That is all. Thank you.

Prosecution Evidence
No.13

HIS LORDSHIP: Yes, Mr. Edwards?

MR. EDWARDS: No questions, M'lord.

Reuben Robertson
(Re-called)
Cross-examination
(continued)

HIS LORDSHIP: Yes. Stand down (Witness stands down).

No.14

Dr. John Martin
Examination

No.14

Dr. John Martin
Examination.

10 DR. JOHN MARTIN: SWORN: EXAMINED BY MR.KERR:

Q. Is your name John Martin:? A. Yes sir.

Q. And are you a registered Medical Practitioner? A. Yes sir,

Q. And Medical Officer for Kingston? A. Yes sir.

Q. Now, Doctor, on the 19th of February this year, did you perform a post mortem examination on the body of a young man? A. Andrew Barton.

20 Q. The body was identified to you as that of Andrew Barton? A. Yes sir.

Q. And it was identified to you by Allan Barton? A. Yes sir.

Q. The post mortem, I believe, was performed at the Public Morgue in Kingston? A. Yes sir.

Q. And what time was it performed? A. About 12.10.

In the Supreme
Court

Prosecution
Evidence

No. 14

Dr. John Martin
Examination
(continued)

Q. Before performing the post mortem, Doctor, did you remove the clothing of the deceased? Was it removed? A. When he arrived all clothing was removed from the body.

Q. Did you make an external examination, Doctor? A. Yes, on external examination there was a bullet entry wound quarter of an inch in diameter, two inches below the left...

HIS LORDSHIP: What? 10

A. Quarter inch in diameter - entry bullet wound, M'lord.

HIS LORDSHIP: Yes?

A....about two inches below the left nipple and about two inches from the sternum (Indicating)

HIS LORDSHIP: Yes?

A. There was another entry bullet wound in the left hip, quarter of an inch in diameter (Indicating). On dissection of the first entry bullet wound mentioned, it was seen to enter the chest between the fifth and sixth ribs, going upwards, piercing the covering of the heart, the pericardium, entering the left ventricle, filling the pericardium, the covering of the heart and the left chest, thorax, with blood. 20

MR. KERR: Now, the pericardium, Doctor, is what? A. Covering of the heart.

Q. Covering of the heart? A. Sac in which the heart is. 30

Q. Sac. Yes? A. It then ricocheted downwards, crossing over the midline of the chest going downwards to the dome of the right lobe of the liver, top of the right lobe of the liver and lodging itself finally between the eleventh and twelfth rib under the skin where there was a wound.

Q. What did you do with this bullet, Doctor?
 A. I removed it and placed it in a bottle, sealed it and handed it to Detective Hanson. (Bottle handed to the witness)

This is the one, sir.

HIS LORDSHIP: Exhibit 3 is it?

MR. KERR: Yes. That is it you say? A. Yes.

MR. KERR: Exhibit 3.

10 HIS LORDSHIP: Before I go further, Mr. Foreman and Members of the Jury, if at any time you wish to see any of the exhibits, you only have to tell me and I will let you see them. If you don't ask me, I take it you don't want to see them. Yes?

A. The second entry bullet wound. On dissection the pathway of the bullet ...

HIS LORDSHIP: Second entry bullet wound?
 A. Yes sir, in the left hip.

20 HIS LORDSHIP: Yes?
 A. the pathway of the Bullet was as follows: smashed its way through the iliac crest or ilium, the hip bone, went right through to the sacrum, that is the back part here (demonstrating) and lodged under the skin. This bullet was also removed, placed in a sealed bottle - placed in a bottle and sealed and handed to Detective...

Q. Detective Hanson? A. Hanson.

30 Q. Pass him Exhibit 4 for me. (Exhibit 4 handed to witness).

HIS LORDSHIP: Exhibit 3?

MR. KERR: Four, M'lord. (To the witness) In that Exhibit you see this bullet? A. Yes.

Q. In your opinion, Doctor, what was the cause of death? A. Damage to the heart by the bullet and massive haemorrhage into the chest.

In the Supreme
 Court

Prosecution
 Evidence

No. 14

Dr. John Martin
 Examination
 (Continued)

In the Supreme Court

Prosecution Evidence

No.14

Dr. John Martin Examination (continued)

HIS LORDSHIP. And massive..? A....haemorrhage into the chest, left chest.

MR. KERR: Doctor, there is evidence that the deceased was struggling with three men and the first shot was heard and he continued to struggle. Shortly after the second shot was heard, assuming that those are the shots that caused those injuries, would you venture an opinion, Doctor, which shot you believe was fired first?

10

A. It depends on how long he struggled. If it was a brief struggle, it could have been the shot that entered his heart. If it was a struggle lasting five, six, ten minutes, I would say that the first bullet was in the hip. In other words, if the bullet had entered the heart he would have very little time to struggle; in the left hip, he could struggle for some time.

Q. I see. Death would have followed, Doctor how long after, say, the injury to the heart?

20

A. Without medical aid and he was a very strong and powerful young man, I would say half an hour to one hour, he would be dead.

(Mr. Kerr sits)

MR. KIRLEW: No questions, M'lord.

HIS LORDSHIP: Yes, Mr. Edwards?

MR. EDWARDS: No cross-examination, M'lord.

HIS LORDSHIP: You may go if you want I take it.

No.15

Jack Morris Examination.

No.15

30

Jack Morris - Examination

JACK MORRIS: SWORN: EXAMINED BY MR. KERR:

Q. Now, is your name Jack Morris? A. It is, sir.

Q. And where do you live? A. I am presently residing at the Courtleigh Manor Hotel in Kingston, Jamaica. My States address is No.16 Tomlinson Drive, Lutz, Florida.

HIS LORDSHIP : Yes?

MR. KERR: Mr. Morris, certain bullets and clothing were submitted to you?

A. It was, sir.

Q. For examination, analysis and an opinion?

A. Yes sir.

Q. Would you tell us what is your qualifications in that regard?

10

A. My formal education was at the University of Tennessee and the University of Tampa, Florida. The training and education in Ballistics and investigative work was at the F.B.I. National Academy, Washington, D.C.; in New York City, Ballistics Bureau of the Police Department of New York City, The Canal Zone Police Federal Organisation for twenty-five years, twenty of which as ballistic expert, International Criminology School, Seattle, Washington, and an
20 advanced course from the Institute of Applied Science, Chicago, Illinois.

Q. Now, Detective Sergeant Hanson, did he on the 20th of February, deliver to you certain exhibits? A. Yes sir.

Q. Where did he deliver them to you?

A. At the Forensic Laboratory, Kingston, Jamaica.

Q. What were they? A. They consisted of .38 caliber, deformed lead bullet marked "A".

30

Q. Did he hand them to you openly or were they in sealed containers? A. They were in sealed containers.

Q. What containers these bullets were in? A. In flask bottles, sealed at the cap.

Q. And you say in one bottle you saw what? A. I beg your pardon?

Q. In one bottle, did it have any marking on it, that bottle? A. It did have some marks on there.

In the Supreme Court

Prosecution Evidence

No.15

Jack Morris Examination
(continued)

In the Supreme
Court

Prosecution
Evidence

No.15

Jack Morris
Examination
(continued)

Q. Any lettering for identity?

HIS LORDSHIP: Yes. He said, "Marked 'A'".

A. Marked 'A' and on the label of the
bottle, "Removed from..."

MR. KERR: Never mind that. It was marked 'A'
was it? A. It was.

Q. What you say was in this bottle? A.
Thirty-eight caliber deformed lead bullet.

Q. Yes. In the other bottle? A. It was
marked 'B'. 10

Q. Marked 'B'. Yes? A. It also contained
a .38 caliber deformed lead bullet.

Q. Did you examine and compare these bullets?
A. I did, sir.

Q. How did you examine them? A. by placing
the bullets under a high-powered comparison
microscope.

Q. And as regards the exhibit, this bullet in
bottle 'A' what did you find? A. I found
the bullet a .38 caliber in size, that it
contained five lands and grooves commonly
called rifling, which is caused by the
bullet passing through the interior of the
barrel of a firearm. 20

Q. I see. What is the difference between a
'land' and a 'groove'? A. A 'groove' is
the valley that is imprinted on the bullet and
the 'land' is the rise, shoulder section.

Q. Did you measure these? A. I did, sir.

Q. What were your findings? A. I found that
the land marking was .112 thousandth of an
inch and the groove marking was .1051
thousandth of an inch wide. 30

Q. Yes? A. That the spiral of these
markings were of a right-hand twist and
that the bullet weighed 153 grains. On
the second bullet, if I may?

Q. Yes. A. I found the same five lands and grooves existing and the same measurements of .112 thousandth land wide and .1051 thousandth groove wide with right twist and weight of bullet "B" was 155 grains.

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Evidence

No.15

Jack Morris
Examination
(continued)

Q. Now, from the examination of these bullets did you come to any conclusion, Mr. Morris?

10

A. Yes sir, I came to the conclusion in making the comparison of the two bullets simultaneously under the microscope that they were both fired from the same weapon.

Q. Would you care to venture an opinion as to what type of weapon you believe fired these bullets? A. Yes sir, this measurement disclosed the weapon to be a Smith and Wesson of thirty-eight calibre.

20

Q. On that same day, did Detective Hanson submit to you certain clothing, in particular a shirt, sweat shirt? A. He did, sir.

Q. Did you notice anything about this shirt? A. I did. I examined the shirt. It was a white shirt, sweat shirt, size 38, with the label "Janit" (J--A--N--I--T), thereon. And I found an entry hole measuring 6mm. wide by 8mm long at front centre around which there was a darkened, smudged area measuring 10 mm. wide by 15 mm. long.

30

Q. Is this shirt, the shirt? Part of Exhibit 1, M'lord.

HIS LORDSHIP: Yes, 1A or 1B?

MR. KERR: Now exhibit 1A, if Your Lordship pleases. A. Yes sir, this is the shirt. That is my initials on it and the date.

Q. Now, did you carry out certain tests on examination of this shirt? A. I did sir. I examined the shirt for, first of all, whether or not the smudged area was caused by the discharge of a firearm. This I did by means of removing part of the cotton fibre for processing and therefore

40

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Evidence

No.15

Jack Morris
Examination
(continued)

I found that the fibres contained burnt particles of nitrate.

Q. Where did you remove the particles from?
Just show us. A. I beg your pardon?

Q. Show us where you removed the particles from?
A. At the entry hole, right here (Indicating).

Q. I see. Yes? What you said you found?
A. I stated that I found the particles to contain - I mean the fibres to contain burnt particles of nitrate. 10

Q. And did you conduct numerous tests?
A. I did, sir. I conducted a further test with the type of ammunition that was

Q. Similar to these bullets? A. Similar to the bullets, of the same manufacture, and found that over - a distance of over six inches from the article no smudge would be left. 20

Q. Using what sort of revolver? A. I used an inch and a half barrel, Smith and Wesson, .38 calibre revolver.

Q. From these tests, Mr. Morris, would you give an opinion as to how far would you say the muzzle of the revolver was from the shirt when it was fired? A. In the test that I made, I found that the muzzle had to be almost in contact with the article upon which the smudge was left, when fired. 30

Q. When you say almost in contact, would you give us a range? A. Well, as I

stated before, it had to be within six inches or less when fired. Through these tests, narrowing the distance down to contact, I found that practically within one half or less from the article when fired.

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Court

Prosecution
Evidence

No.15

Jack Morris
Examination
(continued)

Q. One half what? A. One half inch,
- beg your pardon - or less.

10 Q. That is from six inches to within one
half, you say? A. No, the muzzle of
the firearm had to be one half inch or
less.....

Q. I see. To create...
A.....from the garment or the article...

Q. The person wearing it? A.....from
the sweat shirt, when fired.

Q. You did not examine a pair of trousers,
did you? A. No sir, I did not.

20 Q. Well, would look at this pair of trousers
for me. Part of Exhibit 1, M'lord.
Now Exhibit 1B.

HIS LORDSHIP:. 1B.

MR. KERR: Do you see a hole there, Mr.Morris?
A. I do, sir,

Q. Would you venture an opinion as to what
would cause that hole? A. No sir,
I cannot at this time.

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No.15

Jack Morris
Examination
(continued)

Q. You probably have to test it. What is the size of that hole?
A. (Measures it in court). I find this hole to be 14 millimeters long and 9 millimeters wide at the widest point.

Q. Let us see that. (Exhibit passed to Prosecutor). Mr. Morris, without making a test, may I ask you this, could the passage of a bullet cause that hole?
A. It could.

10

DEFENCE COUNSEL Mr. Kirlew: No questions please m'lord.

DEFENCE COUNSEL Mr. Edwards: No questions m'lord.

HIS LORDSHIP: Yes. Stand down.

PROSECUTOR: May the ballistic expert, m'lord be excused.

HIS LORDSHIP: Yes.

PROSECUTOR: That, if your Lordship pleases, is the case for the Prosecution.

20

No.16
Proceedings.

DEFENCE COUNSEL Mr. Edwards: May it please you m'lord, I would like to make certain submissions to your Lordship in the absence of the Jury.

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Supreme
Court

HIS LORDSHIP: Yes. Mr. Foreman, Members of the Jury, once again, would you please retire to the Jury room. Do not discuss this case among yourselves.

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Proceedings
21st November
1967.

(Jury retires at 11.34 a.m.)

HIS LORDSHIP: Yes Mr. Edwards.

10 MR. EDWARDS: May it please you m'lord. I wish to submit at this stage that there is no case against the accused Dennis Barth that should be left to go to the Jury. The only evidence so far, m'lord, is that of Camille Chung and all she has said is that two boys held her, one being Dennis Barth, that she dragged them to the car, Dennis Barth left her there, went towards where the deceased was with the others and returned to the car. He was beside
20 the car when the first shot was fired. Your Lordship will appreciate therefore, that the only evidence against Barth from that statement is that he committed an assault against her, a battery against Camille Chung. That is all that he committed, by her evidence.

The only other evidence that mentions Barth in this case is the statement of Maloney Gordon and as your Lordship knows, that statement is not evidence against Dennis Barth.
30 That statement suggests that Barth with the others went out to Palisadoes Road with the intention to steal or to rob.

My submission therefore m'lord is, that there is no evidence against Barth that suggests that he had an intention to kill the deceased, that he personally had an intention. There is no evidence against Barth to suggest that he had a common design with any one who might have had an intention to kill or to do grievous
40 bodily harm. And therefore I submit m'lord that the state of the evidence is such that there is no case against the accused Barth that is fit to be left to the Jury.

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Supreme Court

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1967 (Contd.)

On this point m'lord, I would first direct your Lordship's attention to the Practice Note at 1962 I All England Reports at page 448 - Practice Note. Magistrates - No case to answer - Criminal Charge - Considerations for guidance of justices, I would submit, m'lord, without attempting to be derogatory to your lordship's dignity here...

HIS LORDSHIP: I am referred to as Justice, Mr. Edwards. 10

MR. EDWARDS: Not in the same way at all times m'lord.

HIS LORDSHIP: Go ahead.

MR. EDWARDS: Now - Lord Parker, Chief Justice said -

"Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations. 20

A submission that there is no case to answer may properly be made and upheld: 30
(a) when there has been no evidence to prove an essential element in the alleged offence;
(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or so manifestly unreliable that no reasonable tribunal could safely convict on it. "

I submit m'lord that I come under (a).

"when there has been no evidence to prove an essential element in the alleged offence"

Now my reason for saying that m'lord, is in the Queen v. Andersen and Morris 1966 2 40

All England Reports at page 644 m'lord and 1967
5th Criminal Appeal Report at page 216.

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HIS LORDSHIP: That will support you?

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MR. EDWARDS: I have both reports. The head note
reads -

10 "Where two persons embark on a joint enterprise,
each is liable criminally for acts done in
pursuance of the joint enterprise, including
unusual consequences arising from the
execution of the joint enterprise; but if one
of them goes beyond what has been tacitly
agreed as part of the joint enterprise, the
other is not liable for the consequences of
the unauthorised act."

20 "M., having been engaged in a fight in a street
with one W., accompanied A. later in the same
day to a different street, where A. attacked W.,
stabbing him with a knife so that he died. M.
denied that he knew A. had a knife and that he
joined in this fatal attack on W. A. said
that he called on M. to assist him, but that
the latter refused to do so. The jury were
directed that if they thought that there was a
common design by A. and M. to attack W. but
that it was not proved that M. had any
intention to kill W., or to cause him grievous
bodily harm, and that the act was outside the
common design to which M. had been a party,
30 then they could find A. guilty of murder and
M. of manslaughter, provided the latter took
part in the attack or fight with W. A. was
convicted of non-capital murder and M. was
convicted of manslaughter. On Appeal,

Held: the direction to the jury was a
misdirection, the law being as stated at
letter B above, and M's conviction would be
quashed."

40 The important part, M'lord, is in the judgment of
the Lord Chief Justice, Lord Parker. M'lord
if I may just deal with the point where Your
Lordship will see the quotation from the
summing-up of the learned trial judge?

HIS LORDSHIP: Yes?

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MR. EDWARDS: The second quotation, M'lord :-

"... The material direction is where the judge said:

'If you think there was a common design to attack (the applicant Welch) but it is not proved, in the case of (the applicant Morris), that he had any intention to kill or cause grievous bodily harm but that (the applicant Anderson), without the knowledge of (the applicant Morris), had a knife, took it from the flat and at some time formed the intention to kill or cause grievous bodily harm to Welch and did kill him - an act outside the common design to which (the applicant Morris) is proved to have been a party - you would or could on the evidence find it proved that (the applicant Anderson) committed murder and (the applicant Morris) would be liable to be convicted of manslaughter provided you are satisfied that he took part in the attack or fight with Welch.'

In passing, I should say that this court has very grave doubts whether the judge really intended to say what he did, and for this reason, that as I have already said, he attached very great importance to the evidence of Mr. Christopher, and indeed had in a later passage gone so far as to say that unless the jury felt sure that they could accept Mr. Christopher's evidence they were to acquit the applicant Morris altogether. Bearing that in mind, one would expect the judge to be giving a direction on the basis that Mr. Christopher's evidence was accepted, and that the jury were satisfied that the applicant Morris knew that the applicant Anderson had this knife and had in a moment of anger armed himself with it. However, whatever we think, the judge on the transcript had told the jury that they could convict or indeed should convict the applicant Morris even though he had no idea that the applicant Anderson had armed himself with a knife. In other words, this court must approach the case on

the basis that the jury fully understood that that was being put before them as a direction in law.

Counsel for the applicant Morris submits that that was a clear misdirection. He would put the principle of law to be invoked in this form: that where two persons embark on a joint enterprise..."

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10 Please note, M'lord, all that there is, is that the boys were there; two advanced to the girl.

"...each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally, he says it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise. In support of that, he refers to a number of authorities to which this court finds it unnecessary to refer in detail, but which in the opinion of this court shows that at any rate for the last 130 or 140 years that has been the true position. This matter was in fact considered in some detail in R. v. Smith, which was heard by a court of five judges presided over by Hilbery, J., on Nov. 6, 1961, a case in which SLADE, J. gave the judgment of the court. That case was referred to at some length in the later decision in this court of R. v. Betty. It is unnecessary to go into that case in any detail. It followed the judgment of SLADE, J. in R. v. Smith, and it did show the limits of the general principle which counsel for the applicant Morris invokes in the present case. In R. v. Smith the co-adventurer who in fact killed was known by the accused to have a knife, and it was clear on the facts of that case that the common design involved

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an attack on a man, in that case a barman, in which the use of a knife would not be outside the scope of the concerted action.

Reference was there made to the fact that the case might have been different if in fact the man using the knife had used a revolver, a weapon which he had, unknown to Smith. The court in R. v. Betty approved entirely of what had been said in R. v. Smith, and in fact added to it. In passing, it is to be observed that, as counsel for the applicant Morris has pointed out, the headnote to R. v. Betty may go somewhat further and may have led the judge in the present case to think that there were no such limits to the principle. Counsel for the Crown, on the other hand, while recognising that he cannot go beyond this long string of decided cases, has said that they are really all part and parcel of a much wider principle which he would put in this form, that if two or more persons engage in an unlawful act and one suddenly develops an intention to kill whereby death results, not only is he guilty of murder, but all those who have engaged in the unlawful act are guilty of manslaughter. He recognises that the present trend of authority is against that proposition, but he goes back to R. v. Salisbury in 1553. In that case a master had lain in wait to attack a man, and his servants who had no idea of what his, the master's, idea was, joined in the attack, whereby the man was killed. It was held there that those servants were themselves guilty of manslaughter. The court is by no means clear on the facts as reported that that case is really on all fours, but it is in the opinion of the court quite clear that that principle is wholly out of touch with the position today. It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today. Counsel for the Crown in his attractive argument points to the fact that it would

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10 seem to be illogical that, whereas if two people had formed a common design to do an unlawful act and death resulted by an unforeseen consequence, they should be held, as they would undoubtedly be held, guilty of manslaughter; yet if one of them in those circumstances had in a moment of passion decided to kill, the other would be acquitted altogether. The law, of course, is not completely logical, but there is nothing really illogical in such a result, in that it could well be said as a matter of commonsense that in the latter circumstances the death resulted or was caused by the sudden action of the adventurer who decided to kill and killed. Considered as a matter of causation, there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked on as causative factors. 20 Looked at in that way, there is really nothing illogical in the result to which counsel for the Crown points. Be that as it may, this court is quite satisfied that they should follow the long line of cases to which I have referred, and it follows accordingly that, whether intended or not, the jury were misdirected in the present case, and misdirected in a manner which really compels this court to quash the conviction of the applicant Morris. In the result leave to appeal will be granted to both the applicants; this will be treated as the hearing of the appeal and in the case of the applicant Anderson, instead of quashing the conviction, the court will direct a new trial under section 1 of the Criminal Appeal Act 1964. In the case of the applicant Morris, they will allow the appeal and quash the conviction."

40 The other case on the point is R. v. Graham and Mandro, 6 J.L.R. at p. 38, M'lord. The headnote reads, M'lord :-

HIS LORDSHIP: Yes. I will try to follow.

MR. EDWARDS: Yes, M'lord. The headnote reads m'lord -

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"The deceased, J., was alone at his home on the morning of March 14, 1951. That evening his body was found near his latrine..."

M'lord it would be shorter if I read the judgment of the acting Chief Justice, Sir John Carberry.

"Both appellants were convicted on the 5th of June, 1951, in the circuit court at St. Ann of the murder of Nathan Jackson by a jury before MacGregor, J. (6 J.L.R. 1951-1955 pp. 39-42). 10

Now m'lord applying that - your lordship has before you the depositions? The depositions show that at the start four accused were charged with murder. The evidence against Edward Thompson was that he was one of the two persons who held Camille Chung by her hand and took her to the car. In view of that the learned Director of Public Prosecutions has decided to proceed against Edward Thompson for robbery only, or rather he has decided not to proceed against Edward Thompson for murder. 20

HIS LORDSHIP: If there was a common design to commit violence, then all five persons by their presence, aiding and abetting, that type of violence which resulted in death, could not all five persons be charged with murder- Are you citing authority that because they have done that, that that is the law? 30

MR. EDWARDS: If your lordship will bear with me a little I will come to that point, but I am just making this first point m'lord and this first point that I will make is that at the preliminary examination, all four were charged with murder. That yesterday when this trial began the learned Director of Public Prosecutions intimated to this Court that he was not proceeding against Edward Thompson for murder. He intimated to the Court that they were not going to be charged - that Edward Thompson was not going to be charged with murder. 40

PROSECUTOR: I never intimated a thing, I never mentioned it.

HIS LORDSHIP: I know nothing about Thompson, but it may be mentioned in the course of evidence something about Thompson.

MR. EDWARDS: Well the point I am making m'lord ...

10 HIS LORDSHIP: The point that you are making is that if upon the evidence there was a common design to attach someone with violence, then if the Director of Public Prosecutions chooses only to charge two, because he could place the two around the person of Barton that therefore the others could not be charged for the murder. Does it make any precedence in Law that he could not very well have charged all five for murder? And because he has not done so is there
20 authority for you to tell me well then you see very well, there is no case against Barth for murder.

MR. EDWARDS: No m'lord, I was merely putting it in its proper context, and I am saying m'lord we begin with that proposition.

30 HIS LORDSHIP: Let us try to reason, it is an important point. I am not brushing you aside, but let us see what authorities we have on the matter. I am referring now to the Law Quarterly Review Vol. 82 October 1966. An article at page 456 on the case of R. v. Morris you quoted. Now this is what the learned writer you know full well you can look upon the editor A.L. Goodhart as an authority, perhaps, if not I think in practice but in law so far as the Law is concerned. The only thing is he doesn't write all the reports for all the cases. This is onethat is written by him because it is issued under him. This is what it said.

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40 "An interesting criminal case is R. v. Morris", etc. "It will be convenient to reduce the statement of facts in this note to a bare outline as many of those in the report relate to matters that are not relevant to the main

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point. Morris saw Anderson's wife being pursued by Welch. Morris and Welch fought and Welch ran away. When Anderson returned he was told what had happened. It was alleged by the prosecution that he, his wife and Morris went in a car to find Welch. When he was found there was a fight between Anderson and Welch, in the course of which Welch was stabbed to death. Morris was charged with murder. In charging the Jury Howard J. stated that if there was a common design to attack Welch, but it was not proved that Morris knew that Anderson had a knife and Morris had no intention himself to kill or cause grievous bodily harm to Welch, then Morris would be liable to be convicted for manslaughter, only if 'you are satisfied that he took part in the attack, or fight, with Welch.' Morris was convicted of manslaughter and sentenced to three years' imprisonment. The Court of Criminal Appeal quashed the conviction, Lord Parker C.J. saying :

'It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.'

Now the authority goes on:

"The emphasis here is on the words 'one of them has departed completely from the concerted action of the common design.' If Morris had gone with Anderson to meet Welch for the purpose of discussing the situation in a peaceful manner it is clear that there could be no common design that Anderson would attack Welch, but if Morris knew that Anderson intended to use force against Welch then a different problem would arise. In the present case, the jury seems to have found that there was such a common design. Did the fact that Anderson used a knife, of which Morris was unaware, mean that there had been a complete departure from the common design?"

10

If X and Y enter into a common design to rob A and in the course of that robbery X shoots A, would it revolt the conscience of people today to say that Y was guilty of manslaughter, although he did not know that X had been armed? Is there not something to be said for the view that where X and Y combine in a common design to do an act which will probably injure A, then Y will be liable for manslaughter even though the injury which led to A's death was caused by X in a way that Y had not anticipated? It may be said that X had not departed completely from the concerted action merely because he has acted in an unforeseeable way. The point of issue here is of major importance under modern circumstances. If a gang of young thugs attack a man, who is stabbed

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by one of them, will the other members of the gang be able to plead that they are not guilty of manslaughter because they did not know that one of their associates was carrying a knife-

Now, so far as Morris' case is concerned it could well be that Anderson, Anderson's wife and Morris could probably have gone to look for Welch with the view that there could be a peaceful discussion of the incident that happened before.

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MR. EDWARDS: Yes m'lord.

40

HIS LORDSHIP: Very well, so therefore the Crown must show from the beginning if a knife was produced suddenly at the crucial point that Morris knew that Anderson had a knife with him. But now, take a case as this article is well pointing out - I am not saying that I am with it on all fours with the present case, because, first of all, we have to have common design, but in a case where two persons intend to rob, that is, larceny coupled with an intention to use violence - there is a difference between this and Morris - and if that violence is supposed to have been intended by the man who actually did the shooting, the intent to kill or to cause really serious bodily harm in the other case of the man

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who was present - Suppose he knew or had reason to believe that the other man had a gun, what happens then? Let us say, according to this that part I do not agree however - that if that man did not know that Gordon had a gun, well it is stated here that that man could be convicted of manslaughter, but I differ and I am stating my reason in that if I were to tell the jury that Barth, in this case, did not know that Gordon had a gun and therefore he can be guilty of manslaughter because of the circumstances of the common design to commit robbery. I would in effect be telling the jury to re-introduce the law of constructive malice which had been abolished in 1958 in Jamaica. In other words, to tell them that if in the course of committing a felony which is accompanied with violence that inadvertently, without knowing that the other person had a gun, that person were, or one of them were to shoot and kill, if that person can by constructive malice be guilty of murder or manslaughter, I would be reintroducing the law of constructive malice. So far as I can agree with the authority is there any evidence by which the defendant Barth could have known that Gordon had a gun? And if he did know or had reasonable grounds for believing then he could be guilty of murder if he too had the intent that that degree of violence would be to kill or to commit serious bodily harm, he, too, would be guilty of murder. Or even if he knew that Gordon had a gun but that Gordon may have taken it to frighten him and he had such an intent, to frighten the people, therefore his intent would be merely to subject the victim to harm, not really serious bodily harm in which case he can be guilty of manslaughter.

But you see, what you have to argue and convince me about is that there is sufficient evidence for the court to consider as a matter of law that there was this common design to rob, that is,

10 larceny, and the use of violence, and if that is so, did the other man, that is Barth in this case, know or had reasonable grounds for knowing that the other man Gordon had a gun unless, of course, it was too late in which case that is a different point. That is the issue and you can argue it to me whether or not according to the facts I should rule in your favour. That is the nut-shell of all the issues concerning this case.

MR. EDWARDS: Well, the crown's case is, m'lord, that five boys approached these two people; that two held this girl, one of them being Barth, and took her to the car.

HIS LORDSHIP: Yes.

20 MR. EDWARDS: She does not say that there was any attempt made by Barth....

HIS LORDSHIP: Pardon me. Where your strong point now is, is that the prosecution knew full well that the circumstances were such that the others could not have known that Gordon had a gun, that is why they have not charged them for murder together.

MR. EDWARDS: And now we are in the same position m'lord.

30 HIS LORDSHIP: Now the evidence turns out that not only was Barth together with Gordon but the point is that Barth was with this girl before the shots were fired, had gone towards Barton - we don't know for what purpose - had come back to the girl, and just at that point, standing by the car when the shots were fired, that makes it a little more remote.

MR. EDWARDS: That is the position.

40 HIS LORDSHIP: A little more remote in the sense - Was he in such a position? when there is no evidence to suggest that Gordon

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had a gun, or, as the case may be, the other man who probably, you say, did the shooting, had a gun.

MR. EDWARDS: That is how I see it m'lord and I would say, m'lord that on the basic principles of the criminal law, as your lordship knows, the Crown has an onus on them to prove certain things. This evidence does not take it any further than that he was standing by as a spectator.

10

HIS LORDSHIP: You see, Smith's case, that is the one quoted in the report..,

MR. EDWARDS: In Anderson's case...

HIS LORDSHIP: In Morris' case it says this:

"In R. v. Smith the co-adventurer who in fact killed was known by the accused to have a knife, and it was clear on the facts of that case that the common design involved an attack on a man, in that case a barman, in which the use of a knife would not be outside the scope of the concerted action."

20

And it goes on:

"Reference was there made to the fact the case might have been different.."-

In other words, the man could not have been convicted -

".. if in fact the man using the knife had used a revolver..."

30

MR. EDWARDS: That is on all fours with the submission here, m'lord.

HIS LORDSHIP: "... a weapon which he had unknown to Smith."

MR. EDWARDS: Well, I am saying here, m'lord that there is no evidence that the crown can call to say that Barth had this

knowledge, the knowledge that whoever used the gun had a gun, and to show that there was a common design to use that type of force. We are on all fours.

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10 HIS LORDSHIP: Tell me, answer me what you propose the prosecutor will say as to the effect of the common design and violence amounting to the use of the gun, of the knowledge or not in Barth that the others had a gun. Your aspect of the story would negative the prosecution's case that that could have been so.

MR. EDWARDS: 'Could have been so', m'lord, is not sufficient in the criminal law.

HIS LORDSHIP: Why?

20 MR. EDWARDS: Because the onus is on the crown, m'lord. This case is very similar to Mandro and Graham where the learned Chief Justice said, "That granted there could have been a common design to steal and everything showed that that would..."

HIS LORDSHIP: That is the local case?

MR. EDWARDS: That is the local case, m'lord.

HIS LORDSHIP: There was evidence to steal without violence, robbery means with violence or being together not necessarily with violence, being together.

30 MR. EDWARDS: Yes, all he did was to take the girl to the car and stand up beside her. This is on all fours with the idea that the person went to use - the illustration that Your Lordship gave before in R. v. Smith, and where a person intends to take from a person and used no more violence than that..

40 HIS LORDSHIP: So robbery means taking with violence or with force or together but not the only rational conclusion, with the use of a dangerous weapon, unless that dangerous weapon is with the knowledge of all parties in possession of any weapon.

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MR. EDWARDS: That is the position, m'lord and I would just add one further thing to my submission, m'lord, and that is the fact that we now have the Statement in, statement made by the other accused man and in this statement, m'lord, there is this sentence that, "We went out there to steal from the...."

HIS LORDSHIP: I have already ruled that that cannot be evidence... 10

MR. EDWARDS: I know that is not evidence.

HIS LORDSHIP: You mean in favour? It can be considered if it is in favour of another accused.

MR. EDWARDS: I know, m'lord, but the point is if this case were allowed to go to the jury, that statement might be thought by the jury as some evidence against us to establish a common design. Your Lordship knows of cases where judges have told juries to disregard certain things and juries have not fully understood and have not followed the advice of the learned trial judge. So I am just saying, m'lord, in this case the crown has not proved... 20

HIS LORDSHIP: What is worrying me, is there sufficient evidence of common design to rob with such a degree of violence as to say that the use of a gun could or was a fact which could reasonably have been foreseen. That is what is worrying me. 30

MR. EDWARDS: And I am saying there is no evidence to suggest that.

HIS LORDSHIP: Yes Mr. Kirlew? Anything you wish to argue?

MR. KIRLEW: M'lord I wish to say nothing.

HIS LORDSHIP: Yes Mr. Kerr?

PROSECUTOR: M'lord I shall be very short because Your Lordship has clearly defined what are 40

the main considerations in this matter and the question is, is this act by the person who did the shooting part of the common design? And this can only be proved in many cases as I said before, by inferences based upon established facts.

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10 Now, M'lord, the evidence is that these five came together and there was a deploying of forces, greater force with the man and lesser force with the woman.

HIS LORDSHIP: Yes, you say, Mr. Kerr, that the use of the gun was well within the scope of the concerted action.

20 PROSECUTOR: I am coming to that m' lord. During the course of the struggle not only was a gun mentioned - he says, I have a gun too - the gun was in evidence for some time; and that when the struggle was going on Barth left the lesser force and went to the other. Well, M'lord, was there an opportunity for him to see that this gun was in evidence? Was there an opportunity for him to know whether he didn't know before - that at that stage the robbery which was simple had developed into an armed robbery? M'lord I appreciate

30 HIS LORDSHIP: Why could it not be said having regard to Chung's evidence now, apart from the depositions, the evidence that she gave

PROSECUTOR: I am coming to that M'lord, as to whether he had taken himself away from the place specifically because of that?

HIS LORDSHIP: Well, why should the inference be such as was more damaging than the incident?

40 PROSECUTOR: I see your point, M'lord. I say this, M'lord that at no stage throughout the proceedings was there any evidence that he disassociated himself from what was going on.

HIS LORDSHIP: He may have.

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PROSECUTOR: I concede, M'lord, that his leaving the spot at the relevant time has considerably weakened the inference but nevertheless it is still there and my submission is simply this M'lord, it is for the jury on consideration of all these aspects, to say whether he was within the common design, that is to use violence of the type used by the actual perpetrator. M'lord I can put it no higher than that. It is a question of whether the inferences are open or whether they point indubitably to him being a party to the armed attack. 10

HIS LORDSHIP: Yes, but you see if that inference amounts to nothing more than high suspicion, very, very great suspicion that he was part and parcel of that particular violence with a lethal or dangerous weapon that is the distinction made, you see. In other words, the onus is more or less on you in that if you want to show other persons combined with the act of one person that other purpose does not only relate to any other rational conclusion such as robbery together with violence of a degree of progression. 20

PROSECUTOR: I realize that and I concede that that difficulty has been enhanced by the witnesses putting him away from the scene at the relevant moment. 30

HIS LORDSHIP: That is why I put it to her in my own words - am I in accord with what she says - my record of her notes whether it was wrong or correct, she said it was correct. And if that was correct then let us say - and I appreciate that your case was dependent upon the inference that whosoever had engaged themselves with Andrew Barton in a robbery must of necessity have contemplated the use of a firearm when it was produced. 40

PROSECUTOR: Yes sir.

HIS LORDSHIP: All up to then it may have been a very strong and reasonably inference to establish a prima facie case of common design.

PROSECUTOR: Yes sir,

HIS LORDSHIP: And I appreciated that the indictment was so framed as to put aside the question of murder and those concerned in the common design to commit murder to those who were in fact engaged in a struggle with Andrew Barton. Where is that inference in regards to Barth when in fact it could be that he may have seen.....

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10 PROSECUTOR: Well m' lord, as it turns out in the case, the evidence has really somewhat from the case as opened, because the case as opened was that he was engaged, and that evidence has shifted a bit and I concede, has considerably weakened the inference.

HIS LORDSHIP: I have that there were two shots.

20 PROSECUTOR: Yes. And if the person engaged heard the shot, did not move, remained and heard another shot, and in the circumstances either or both, would lead up, then there was sufficient evidence - I mean it is a matter for the jury to consider whether the shooting was within the scope of the concerted action. That is all I have to say m'lord.

HIS LORDSHIP: Anything you want to say Mr. Edwards?

30 MR. EDWARDS: Just one thing m'lord. I didn't agree with my learned friend as to one statement of his. That an inference can be drawn that when Barth went up to where the others were, the gun was then in the hand of whoever had it.

40 HIS LORDSHIP: The Director was inclined to agree with you that that particular inference could either connote guilt or was an association with, or the fact that he knew that something was going on which he was not part and parcel of, and then he withdrew himself. Whether that is so or not, we don't know, but we are only

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arguing on the natural presumption of the thing that happened, and if that is so then you don't know whether that inference could not base any criminal motives to Barth so far as robbery is concerned.

MR. EDWARDS: That is all I wish to say on that m'lord.

HIS LORDSHIP: Yes, I have more or less engaged myself in certain arguments with Mr. Edwards on behalf of the accused Barth, and with the Director in order perhaps to let us get some clear understanding as to the issues involved, perhaps that sometimes could save time. I am of the view that from the evidence given, I cannot say for sure that the inference can amount to more than high suspicion that there was this common design to commit larceny with violence or of persons together, and that that particular type of violence would be the use of a lethal or dangerous weapon by one of them. If that is so, then of course the question of common design tying up the accused Barth with the accused Gordon, if he is the one that must have done the shooting, is more or less tenuous.

Apart from that aspect of it, there is evidence by the witness Camille Chung saying that before the shooting the accused Barth was with Andrew Barton and two others. Before the shooting he came and stood by her by the car, and whilst he was there there were two shots fired. Well, it could probably be, that inference could be that he must have seen something that happened of which he is not a party to that degree of violence as to the use of a lethal weapon or dangerous weapon. In such a case I cannot, where there is an inference which would lend the conclusion either of guilt or of innocence that I must necessarily draw the guilty inference. In such a case I would have to draw the more innocent conclusion that he must have disassociated himself from any common design to use the type of violence which was in fact used by anyone.

That is more or less borne out by the framing of the indictment as charging the accused Gordon and the accused Barth for the offence of murder because of the association and because of what was happening in the struggle concerning Andrew Barton who was attacked and shot and killed.

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10 Because of the reasons given, and
the state of the law, I cannot direct a
jury that if the accused Barth did not know
and had no reason for believing that the
accused Gordon had a gun, I cannot in those
circumstances tell the jury that they could
return a verdict of guilty of manslaughter
in the least, simply because I would be
reintroducing the doctrine of constructive
malice when it was in fact abolished by
20 the law of Jamaica - Offences Against the
Persons (Amendment) Law of 1958, because I
would have to tell them that if there was
the commission of a felony, and if in the
course of the commission of that felony
a person is killed, even though that
person is inadvertently killed without the
knowledge and/or without the intention of
the other person to kill or to cause really
serious bodily harm, that would be murder,
it is abolished, that would be wrong law.
30 So I would have to direct the jury that
the state of the law is such that if the
accused Barth knew that the other one had
a gun or had reasonable belief that the
other one had a gun and would have used it,
and would have foreseen the use of it,
then in those circumstances the least that
could be done would be to return a verdict
of manslaughter. But having regard to the
case as a whole, as a ruling in law I
40 cannot find that the Crown has established
a prima facie case so far as the accused
Barth is concerned. I intend when the Jury
comes back to ask them to return a formal
verdict of not guilty in favour of Dennis
Barth.

Jury returned at 12.39 p.m.

Jury roll call taken - all
present.

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HIS LORDSHIP: Mr. Foreman and Members of the Jury, I have had full opportunity of listening to submissions in law as well as to the facts relevant to the issues in law. I have ruled in favour of Dennis Barth that there is not a prima facie case for you to consider on either the offence of murder or manslaughter, and I therefore direct you to return a formal verdict of not guilty in favour of Dennis Barth, of not guilty. He may be guilty of some other offence, we are not presently concerned with that. Will you please consider and you will be asked by the Registrar to return a verdict of not guilty in favour of Dennis Barth. 10

REGISTRAR: Mr. Foreman, please stand.
Members of the Jury, have you arrived at your verdict?

FOREMAN: Yes Sir. 20

Q. Do you find the accused Dennis Barth guilty or not guilty of murder? A. Not guilty.

Q. You find the accused Dennis Barth guilty or not guilty of manslaughter?
A. Not guilty.

Q. That is your verdict and so say you all?
A. Yes.

HIS LORDSHIP: Dennis Barth the jury have found you not guilty on my directions on the state of facts. You are discharged on the offence of murder. 30

Yes, we have the other defendant in the case, the accused Gordon.

REGISTRAR: Maloney Gordon, you have heard the evidence against you, now is the time for you to make your defence. You may do so either by giving sworn evidence from the witness box, when you are liable to be cross-examined just like any other witness, or you may make an unsworn statement from where you are, when you 40

won't be cross-examined, or you may say nothing at all. What do you wish to do?

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MR. KIRLEW: I will put the accused in the witness box. I won't make an opening address as I will be calling another witness, some expert evidence as to the state of the weather.

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HIS LORDSHIP: We should begin now?

10 MR. KIRLEW: Probably at 2.00 o'clock m'lord would be a convenient time.

HIS LORDSHIP: Any objections Mr. Kerr?

PROSECUTOR: No m'lord, it seems a convenient moment.

HIS LORDSHIP: Mr. Foreman and Members of the Jury, we will adjourn the hearing of this case until 2.00 p.m. In the meantime do not discuss this case among yourselves or with anyone.

Adjournment taken.

20 Resumption at 2.03 p.m.

Jury roll call taken - all present.

MR. KIRLEW: M'lord, I will now put Maloney Gordon in the witness box.

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Maloney Gordon.

MALONEY GORDON: SWORN: EXAMINED BY
MR. KIRLEW:

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Q. Is your name Maloney Gordon? A Yes.

30 Q. And where you used to live?
A. 18 Swettenham Road.

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- Q. Where is that? A. Off Maxfield Avenue, Sir.
- Q. And what work you used to do? A. I am an apprentice mechanic.
- Q. The jurors have to hear you. Now you remember the 18th of February, this year?
A. Yes Sir.
- Q. Sometime at night? A. Yes Sir.
- Q. Where were you? A. On Glasspole Avenue Sir.
- Q. While....

HIS LORDSHIP: What avenue?

ACCUSED GORDON: Glasspole Avenue, Sir.

DEFENCE COUNSEL: While you were there did anyone come along? A. Yes Sir.

- Q. Who came along? A. Howard Simmonds, Sir.
- W. Howard Simmonds? A. Yes Sir.
- Q. How did he come along? A. He was driving a car.
- Q. You have to talk louder than that, as loudly as you can. A. He was driving a car, Sir.
- Q. Now, did he stop? A. Yes Sir.
- Q. Did he speak to you? A. Yes Sir.
- Q. What did he say to you? A. he said to me, 'Let us go for a drive'.
- Q. Did you agree to go? A. Yes Sir.
- Q. Was there anyone else in the car?
A. Well about a chain up further....
- Q. At the time when he stopped, was there anyone else in the car? A. No Sir.

10

20

30

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Q. Did you go in the car? A. Yes Sir.

Q. Now, did you know him before? A. Yes Sir.

Q. How long had you known him before?
A. Long, long time, Sir.

Q. How had you got to know him? A. We
used to go to school together, Sir.

Q. Now what build person is Howard Simmonds?
A. Well the two of us, wear the same pants
and all that. The same build. Same
height and same complexion too, Sir.

10

Q. Now after you went in the car anything
else happened? Did he stop again?
A. Yes, about a chain and a half further
we see five boys Sir.

Q. So what happened? A. Well him stopped
and them talk, and them come in the car,
Sir.

Q. You heard what the talk was about?
A. About the drive, Sir.

20

Q. Well tell us what he said. A. Well they
only said they going for a drive, if me
would like to come. Well I say, Yes, Sir.

Q. Now who drove the car? A. Howard, Sir.

Q. Now who else were in the car? A. Well
there was seven of us in there, Sir.

Q. Who were they? A. There was Dennis Barth...

HIS LORDSHIP : Dennis?
A. Yes Sir.

30

MR. KIRLEW: What Dennis that is?
A. Dennis Barth, Sir and Garth and Little
Junior....

HIS LORDSHIP: Garth?

MR. KIRLEW: Garth what?

HIS LORDSHIP: Garth?

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ACCUSED: Garth Williams, Edward Thompson and
me and Howie, Sir.

HIS LORDSHIP: And Howard?
A. Yes Sir and Trevor, Sir.

HIS LORDSHIP: Yes?
A. And Maurice, Sir.

MR. KIRLEW: And who? What is the last one?
A. Maurice, Sir.

Q. Maurice? A. Yes Sir.

Q. Now where did Howard drive to? 10
A. Well, he drive to the Airport roundabout,
Sir.

Q. The Airport roundabout? A. Yes Sir.

Q. That is where he stopped? A. No Sir.

Q. Where did he drive to? A. He just turned
and come down back to Rockfort.

Q. Now what happened while you were coming
back? A. When we coming back we see a
little red car parked over the far side
of the big sea side, Sir. 20

HIS LORDSHIP: Little red car? A. Yes Sir,
parked over the big sea side of the road,
Sir.

MR. KIRLEW: Yes, and what happened?
A. Well him drive down the bottom side of
the little red car and stopped.

Q. Who is him? A. Howard drive down bottom
side the little red car and stopped.

HIS LORDSHIP: Yes. 30
A. Well after him stopped him said to we in
the car, 'Mek we go look some money from
the people that in that car'.

MR. KIRLEW: Mek we go look some money from the
people in that car? A. Yes Sir,

Q. Yes. A. Well everybody start to say,

'Well then is not that dem come for, just a drive.

HIS LORDSHIP: Yes. A. Well him say if nobody na come with him we have fe walk go back.

MR. KIRLEW: Yes, well what happened?
A. Well we come out of the car.

Q. Who came out? A. The whole of us, Sir.

Q. How many? A. Seven of us Sir.

10 Q. Yes? A. We came out the car and decide to go with him go look the money, Sir.

HIS LORDSHIP: And started to what?
A. Go with him and look the money.

HIS LORDSHIP: Yes.

MR. KIRLEW: This car was parked how, this red car? A. It was parked, Sir.

Q. This is a red car you say? A. Yes Sir.

Q. How was it parked? A. I think the back was towards the sea or something like that.

20 Q. It was - the back to the sea?
A. Yes Sir, somewhere about that, Sir.

Q. And the front? A. The front was to the road, Sir.

Q. All seven of you came out of the car?
A. Yes Sir.

Q. You went to where the car was, the M.G. was? A. Yes Sir.

Q. Yes? A. Well, we never see anybody in it, Sir.

30 Q. You didn't see anyone in it? A. No Sir.

Q. What next? A. Well about two, Howie and another one was walking go down the beach side.

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HIS LORDSHIP: Howie what? A. Howard, Sir.

HIS LORDSHIP: Howard and who?
A. Maurice, walk go down the beach side,
Sir.

HIS LORDSHIP: And Maurice? A. Yes Sir.

HIS LORDSHIP: Walked down by the beach side?
A. Yes Sir. Well I hear when him say
'See two people here'.

MR. KIRLEW: What about yourself?
A. Well the two of them was down there, Sir. 10

HIS LORDSHIP: Two, who are they?
A. Howard and Maurice were down there.

MR. KIRLEW: Howard and Maurice were down
where? A. Down by the beach and they say,
'See two people here'.

Q. What happened after that? A. After that
we all go down there, Sir.

HIS LORDSHIP: What happened? A. We all go
down there Sir.

MR. KIRLEW: To where the two people were? 20
A. Yes Sir.

Q. Yes, and what happened there?
A. When we go down there 'Copper', Dennis
and Junior hold the girl and take her ring,
I don't know which part they carry her go,
but she was in the car.

HIS LORDSHIP: Dennis and who?
A. Dennis and Junior.

HIS LORDSHIP: Did what? A. Took away the
ring, Sir, took away the girl. 30

MR. KIRLEW: Yes? A. Well after they took
away the girl the other five of us were
talking to the man.

HIS LORDSHIP: Yes.

MR. KIRLEW: And what happened?
A. Well after that now.....

Q. Talk loudly, we want to hear you.
 A. Well nothing never take place there, Sir.

HIS LORDSHIP: Alright, nothing never take place there.

MR. KIRLEW: Yes?
 A. Well, two of us that was there leave about from here to which part that table is, Sir.

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10 HIS LORDSHIP: From where you are to the table?
 A. Yes Sir. Well I don't know what the other three and the man have, but a wrestle start between them and the man. Well I turned back. When I turned back, Sir, I see Howie and the man close up together. Well after that now I move, I take away the man, part them from one side.

MR. KIRLEW: Did you hear anything, any words?
 A. Not yet, Sir.

20 HIS LORDSHIP: Take away the man from them?
 A. From Howie, Sir.

HIS LORDSHIP: Yes
 A. Well after I take away the man I hear Howie say, 'You lucky I didn't shoot you'. Well I take away the man from about - after I take away the man from about here to which part that policeman sitting, well he was standing there alone, he say to me, the money that your friend want down there on the beach, I leave it in my wallet where we were sitting.

30

MR. KIRLEW: What he said?
 A. He said the money what my friend want is down there on the beach in my wallet.

Q. The wallet was down there he said?
 A. Yes Sir.

HIS LORDSHIP: Was down there on the beach where they were? A. Where the two of them were sitting down, Sir.

40 HIS LORDSHIP: Yes? A. Well, me and Garth

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leave and go down on the beach to see if we find the wallet.

HIS LORDSHIP: To see if you find the wallet?

A. Yes Sir.

HIS LORDSHIP: Yes.

A. Well when we go down the beach we didn't see anything at all, Sir. When we coming up back now, I said to 'Copper' "Must let go the girl".

MR. KIRLEW: To whom?

A. 'Copper' and Junior. Dennis and Junior let go the girl.

10

HIS LORDSHIP: Who said to who?

A. I say that Sir.

HIS LORDSHIP: To whom?

A. To Dennis and Junior say he must let go the girl and come.

HIS LORDSHIP: And what? A. Come Sir.

HIS LORDSHIP: Yes?

A. Well, we started to walk toward the car to come out, Sir.

20

HIS LORDSHIP: Started to walk.....

A. Towards the car, that time I don't really know if Dennis and Junior had let go the girl yet.

HIS LORDSHIP: Started to walk towards the car?

A. Yes Sir.

MR. KIRLEW: At that time where Barton and the others were? A. When I go down the beach I left Barton standing up alone. When we come back the three of them were there.

30

Q. You passed them, you had to pass them or what? A. I didn't have to pass them. While we was walking going on I hear a shot fire.

HIS LORDSHIP: When I was walking going towards the car? A. Towards the car that we come out, Sir.

HIS LORDSHIP: With Dennis? A. No Sir, with Garth.

HIS LORDSHIP: Yes.

MR. KIRLEW: Which car were you walking towards? A. The one that we come out, Sir.

HIS LORDSHIP: The one what? A. That we come out, Sir.

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10 HIS LORDSHIP: Yes. A. Well, we look back, the two of us look. When we look we see Howie with the gun in him han'.

HIS LORDSHIP: Look back and do what? A. Run toward him now to try and see, try and take away the gun from him.

MR. KIRLEW: What you did when you heard the shot? A. I intend to stop him from firing the shot.

HIS LORDSHIP: To what? A. To stop him Sir, Howie, Sir.

20 HIS LORDSHIP: Howie? A. Yes Sir.

HIS LORDSHIP: And your intention was what? A. To stop him from firing the gun, Sir.

MR. KIRLEW: Yes, and what happened? A. Well, before we reach him Sir, I heard a next shot fire and the man dropped Sir. Well we all run away Sir and get back in the car, Sir.

HIS LORDSHIP: All run away? A. And go back in the car, Sir.

30 MR. KIRLEW: Now, did you know that Howie had a gun? A. No Sir.

Q. When you went for this drive with him you knew that he had a gun then? A. No Sir.

Q. When you came out the car and went towards the beach, did you know that he had a gun? A. No Sir, none of us didn't know he had a gun.

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Q. Talk about yourself. When is the first time you knew he had a gun?
A. When him say him lucky him never shoot the man.

Q. Did you search this man on the beach?
A. No Sir, I didn't search him.

Q. Nobody searched the man? He wasn't searched?
A. Not in my presence, Sir.

Q. Now when you got back in the car did you have any talk with Howie about the shooting? 10
A. Yes Sir, the whole of us start to say well he shouldn't do it, and if the police hold any of us we going talk, we going say is him. He say if anything like that happen and the man start give out things like that he going shoot somebody.

Q. Now at the time when the shot was fired, how far was Barton from the back of the M.G. car? A. A good distance, about the second bench there, Sir. 20

HIS LORDSHIP. Who was where from the car?
A. Barton, Sir.

MR. KIRLEW: From the back of the car - from where you are to? A. The back of the second bench, Sir.

Q. That is all please m'lord.

Cross-
Examination.

CROSS-EXAMINATION BY DIRECTOR OF PUBLIC PROSECUTIONS:

Q. Howie was your old school mate? A. Yes Sir. 30

Q. He was a friend of yours? A. From at school, Sir.

Q. He died about the first week in March? Isn't it so? A. Yes Sir, I suppose so Sir.

Q. Answer man, speak up. A. Suppose so Sir.

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(Contd.)

Q. You weren't arrested until the 25th of April, isn't that so? A. Yes Sir.

Q. Dead and gone from the first week in March, is that so? A. Yes Sir.

Q. Now on the 29th of April you gave a statement to the police? A. Yes Sir.

Q. Eh? A. Yes Sir.

Q. And that was four days after you were taken in custody? A. Yes Sir.

10 Q. On the 28th of April, the day before the girl pointed you out on the identification parade as the man with the gun?
A. Yes Sir.

Q. Up to that time you hadn't given any statement, you hadn't told the police about it? A. Yes Sir, I told them about it and gave them statement.

Q. You told them before the girl pointed you out? A. Yes Sir.

20 Q. Which policeman? A. Inspector Robertson.

Q. He was here. You mean the same day you gave the statement you told him about Howie? A. From the same day I told him Sir.

Q. I am suggesting to you, you talk about Howie because the girl had pointed you out. A. Talk about Howie before.

30 Q. And you had been arrested, that is why you talk about Howie. Now when you went in the car it was late, about after eleven wasn't it? A. It was later than that.

Q. About what time? A. It was near to 2.00.

Q. And you just drove to the roundabout and turned back? A. To the Airport roundabout.

Q. And turned back? A. Yes Sir.

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- Q. Not going any special place? A. No Sir.
- Q. Glasspole Avenue is a good distance from where you live? A. Yes Sir.
- Q. About how many miles? A. About 4 miles Sir.
- Q. Now when you got in the car did you see Garth, Little Junior and Copper in the car?
A. No Sir.
- Q. The statement you gave to the police in front of the J.P. was read over to you?
A. Yes Sir. 10
- Q. You made alterations? A. I didn't make any alterations.
- Q. You initialled some little changes that were made on it?
A. The policeman just say I must initial the changes.
- Q. Look at the statement, look at it. That is your statement? A. Yes Sir, but....
- Q. Wait. Did you tell him that when you went into the car Garth, Little Junior and Copper were in it? A. No Sir. 20
- Q. You never tell him that? A. No Sir.
- Q. Can you read? A. No Sir.
- Q. You heard all that was read, it was read to you? A. Yes Sir.
- Q. You signed it? A. Yes Sir.
- Q. Now Garth is Garth Williams? A. Yes Sir.
- Q. Little Junior is Edward Thompson?
A. Yes Sir.
- Q. Copper is Dennis Barth? A. Yes Sir. 20
- Q. But you didn't tell the police anything about Trevor and Maurice? A. I tell them Sir.

- Q. Is it in the statement?
A. Dem don't put it, but I tell them, Sir.
- Q. Did you hear the statement read over?
A. Yes Sir.
- Q. You didn't hear those names?
A. Well all that.....
- Q. Wait. You didn't hear those names called?
A. No Sir.
- 10 Q. You asked before the J.P. to put them in?
A. Yes Sir.
- Q. Did he put them in?
A. I don't know that, if he put it because he never read it over back to me again.
- Q. I am suggesting to you that you are putting in Trevor and Howie to increase the number. What sort of a car did you drive in? A. A Hillman.
- Q. What Hillman, new model?
A. The one favour Sunbeam, Sir.
- 20 Q. I am suggesting to you that you put in Trevor and Maurice to increase the number. Now when you coming back, how many trips you make to the roundabout?
A. Just go and coming back, Sir.
- Q. Did you tell the officer in the statement that you made several trips?
A. Didn't tell him anything.
- Q. I am suggesting that you made several trips like a prowl car.
30 A. I never made any several trips, Sir.
- Q. Now when you were coming did you see the car, a little red sports car? A. Yes Sir.
- Q. You could see the colour? A. What Sir?
- Q. The colour? A. Sir? No Sir, I didn't see the colour, when we come out we see that.
- Q. How far you were parked from the sports car?
A. A good distance off, Sir.

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Q. Now you say Howie said, 'Mek us go look some money from the people in that car'?

A. Yes Sir.

Q. What you interpret that to mean?

A. What Sir?

Q. What you believe he meant by that?

A. What you mean by that?

Q. When he said 'Mek we go look some money from the people in the car, you knew that he meant to rob the people?

A. I don't know what it mean.

10

Q. What you think? A. Is either to....

Q. No, No, what you think he meant?

A. I think he mean by taking it from them.

Q. Rob them? Yes Sir.

Q. And you said that you didn't want to go and he said, 'Oonu have to walk?'

A. Yes Sir.

Q. And that is why you go down there with him? A. Yes Sir.

20

Q. Because he said you have to walk?

A. Yes Sir.

Q. Why you didn't stay at the car? You know he was going to rob, why you didn't stay?

A. They was more than me, if I didn't go they would leave me out there, Sir.

Q. Why you didn't stay at the car?

A. If me didn't follow them they would leave me.

Q. You want me to tell why you go down there?

A. Yes Sir.

30

Q. To assist in robbing, that is why you went. Now.....

HIS LORDSHIP: Yes Mr. Gordon, any answer to that statement?

ACCUSED: Sir?

HIS LORDSHIP: The Prosecutor suggested to you that you went down there to assist in the robbery. What do you have to say to that?
A. No Sir.

PROSECUTOR: Now the man was wearing short trousers?
A. Yes Sir.

Q. And a white shirt? A. Yes Sir.

Q. I am suggesting to you Howie went and you told the detective that Howie went and stick up the man with the gun.
A. Went to what Sir.?

10

Q. Stick up the man with the gun. A. No Sir.

Q. You didn't hear that read over in your statement? A. No Sir.

Q. You don't know that that is in the statement? A. That is in there. When I get the notes of evidence and somebody read it to me, but I didn't hear that read over to me, Sir.

20

Q. You hear the part about the man was wearing short trousers though? A. Yes Sir.

Q. And you hear the part about a man and the girl on the beach? A. About the man and girl what, Sir?

Q. On the beach. A. Yes Sir.

Q. But you didn't hear anything about Howie sticking him up? A. No Sir.

Q. Now I am suggesting to you that Howie is a stouter man than you.
A. Well Sir, I tell you me and Howie is on the same build.

30

Q. You get fat since the event, you get bigger, you get stouter?
A. I don't get any way, Sir.

Q. I am suggesting to you now that you are making up Howie to be your size
A. Well I tell you Howie is my size.

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- Q. Apart from Howie, the other boys are shorter than you? A. Yes Sir.
- Q. So if there was no Howie you would be
A. Two of them is shorter than me.
- Q. If there was no Howie you would be the tall man? A. Three of us same height.
- Q. Same colour and size? A. No, two is the same height.
- Q. You and Howie? A. And Garth on the same height but not the same size. 10
- Q. ...Slimmer? A. No Sir.
- Q. Browner? A. Well, a shade, Sir.
- Q. Now, the deceased man Barton had a watch on his hand?
A. I don't know if him have a watch on him hand.
- Q. The watch drop and burst?
A. I don't know that Sir.
- Q. What? A. I don't know if him have a watch on him hand. 20
- Q. In your statement to the detective you didn't tell him the watch drop and burst?
A. No Sir.
- Q. Was the J.P. there when this statement was given? A. Yes Sir, the J.P. was there.
- Q. You searched the man?
A. Didn't search, he wasn't searched in my presence.
- Q. Anybody searched him? A. I don't know.
- Q. When they stick up the man? 30
A. I didn't see anybody search.
- Q. So you didn't get any money? A. No Sir.

Q. I am suggesting that you were among the three that were around the man all the time. A. Well I am telling you not three was around him, Sir.

Q. Now the girl, when she pointed you out on the parade said you were the man with the gun, isn't that so? A. Yes Sir.

Q. What you said that time?
A. I tell the Inspector that they take my picture before they had the parade.

10

Q. Oh! A. I tell the Inspector that they take the picture before they hold the parade.

HIS LORDSHIP: Yes.

ACCUSED: I tell him three times

PROSECUTOR: You told him that on the parade when she pointed you out?
A. Before she point me out, Sir.

20

Q. They did take Howie's picture?
A. Howie no dead, what them a tek fe him picture for?

Q. Oh, now the man put up a struggle, the man put up a fight? A. With who Sir?

Q. Coming to that. I am asking you first, you were there? The man Barton put up a fight. A. Never put up a fight with me.

Q. I never asked you that. The man Barton put up a fight? A. But not with me.

30

HIS LORDSHIP: Did he put up a fight?
A. I see a struggle, I don't know if is something they take away or not.

PROSECUTOR: A big struggle? A. No Sir.

Q. How long did the whole thing last, would you say? Fifteen, ten, twenty minutes?
A. No Sir.

Q. How much? A. Not even quite two minutes.

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examination.
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- Q. Not even two minutes? A. No Sir.
- Q. That you go all down to the beach, according to you? A. When I come from the beach they were not struggling, I stopped them before I go down to the beach.
- Q. When the five of you went up - the five of you went up? A. The seven of us.
- Q. I suggest that two held the girl and three held the man. A. Yes Sir.
- Q. Three held the man? A. Yes Sir. 10
- Q. And you were one of the three? A. No Sir.
- Q. And you shoot him? A. Who Sir?
- Q. You shoot him? A. No Sir, me?
- Q. Twice. A. No Sir.
- Q. And that is why we only hear of Howie. after the girl put the finger on you, said you had the gun.
A. I tell the police from before, from the first day I get hold.
- Q. I am suggesting to you that if the girl never pointed you out you would never have heard of Howie. 20
A. You would still hear of Howie, Sir.
- Q. When you went down there you knew you were going to rob? A. I know? I wasn't going to rob anybody.
- Q. Did you know they were going to rob somebody down there? A. Yes Sir.
- Q. Did you expect that the people round there might resist? A. Yes Sir. 30
- Q. And that the people down there might have weapons? A. No Sir, I didn't think about that.
- Q. What? A. Didn't think about that because it was not my intention to rob them.

- Q. Suppose you got shot? A. That is why I make sure to stay at the back.
- Q. To stay at the back? A. Yes Sir.
- Q. Why you didn't stay at the car?
A. Because I didn't want to walk home back.
- Q. But the car wouldn't move if you were in it?
A. Is me gainst six.
- 10 Q. Then it wouldn't kill you to walk home?
A. That hour, Sir.
- Q. You were not afraid to go down the beach?
A. Anything can happen.
- Q. But you are afraid to walk?
A. Yes Sir, and I was afraid to go down the beach and rob anybody, Sir.
- Q. You were afraid man? A. Yes Sir.
- Q. Why you didn't talk about the killing. Was it because of Howie?
A. Because I didn't want him kill me.
- 20 Q. Howie dead from March, what, you afraid of his duppy? A. Him dead. If I tell the police that them not going believe me.
- Q. But you tell them after the girl point you out. A. Before the girl point me out, Sir.
- Q. Now you said that you heard the man say, 'You lucky me never shoot you'.
A. I hear Howie say that.
- 30 Q. Did you see the gun that time? A. What Sir?
- Q. When you heard him say you lucky I never shoot you, did you see the gun that time?
A. Yes Sir, is after him say that him pull out the gun.
- Q. You see the man? A. Yes Sir, and that is why I moved the man away from where he was, Sir.

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examination.
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- Q. I am suggesting that you are the man with the gun. A. No Sir, not me.
- Q. And that Howie is an invention, is it not, because Howie is dead? A. Howie is the man with the gun.
- Q. Howie is the man with the gun.
A. If Howie never dead and I tell you that Howie shoot him you would believe me Sir?
- Q. Shut up! Howie can't answer, Howie is dead. So that you said Dennis Barth was there, Edward Thompson was there... A. Yes Sir. 10
- Q. Garth Williams was there? A. Yes Sir.
- Q. And you were there? A. Yes Sir.
- Q. Thompson is a friend of yours? A. Yes Sir.
- Q. Barth is a friend of yours? A. Yes Sir.
- Q. Garth Williams is a friend of yours?
A. Yes Sir.
- Q. Out on the road there, you can see anything out there clearly? A. Out by the road?
- Q. On the side where the car parked there is no bush there? A. No Sir. 20
- Q. Sand and.... A. Gravel, Sir.
- Q. Gravel. Sea on that side, clear sea.
A. Dark sea.
- Q. Darker than the land?
A. Well I never in it, I can't tell if it darker than the land or what, Sir.
- Q. I am suggesting to you that the girl saw you with the gun and that you were on e of the three with Howie all the time. A. Well I am telling you that the girl didn't see me with any gun at all Sir. 30
- Q. Is only after she pointed you out you decided to talk about Howie?
A. I tell about Howie from the first day I get hold, Sir.

Q. Did you hear the man say, 'Take everything...'?
 A. Take everything, what Sir?

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Q, Take everything I have? A. No Sir.

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Q. You never hear that answer? A. No Sir.

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Q. I am suggesting to you the man said that
 when he saw the gun.

A. Well I never hear him say that Sir.

Maloney
 Gordon. Cross-
 examination.
 (Contd.)

Q. Did you hear him say, 'I have a gun too'?

A. No Sir.

10 Q. Did you hear? A. The only thing I
 hear him say is, The money that I have
 down on the beach, that is the only thing
 I hear him say.

Q. And he said that he had no money. You
 already searched him and didn't find
 anything? A. I never searched him,
 and he wasn't searched in my presence, Sir.

Q. You say you run back to prevent Howie?
 A. Yes Sir.

20 Q. But nobody moved at all. The first time
 all of you run was when the man shoot
 and the car was coming?
 A. That is the second time I run.

Q. The first time, the only time that the
 whole bunch of you run was when the man
 shoot. Isn't that so?

A. That is the second time I run, Sir.

HIS LORDSHIP: Any re-examination?

MR. KIRLEW: No re-examination m'lord.

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Percy Claude
Muir
Examination.

No. 18

Percy Claude Muir

PERCY CLAUDE MUIR, SWORN, EXAMINED BY
MR. KIRLEW:

- Q. Your full name, please. A. Percy Claude Muir.
- Q. What is your occupation Mr. Muir?
A. I am a Meteorological officer.
- Q. Where are you stationed?
A. At the Meteorological Office, Palisadoes. 10
- Q. Is it a part of your duty to keep records of the movements of the sun and moon?
A. Yes Sir, but not in the sense that we have any instrument for observing the motion of heavenly bodies. The information we have is obtained from this publication which is called the Ephemeris. Actually it is a standard work on the motion of heavenly bodies, and from year to year we have calculated the time of moon rise and moon set. 20
- Q. Alright, you are going a little too fast. Now, can you say from your records when the moon rose on the 18th of February this year and when it set? A. Yes we can say.
- Q. Will you tell the Court when the moon rose on the 18th of February 1967, and when it set?
A. On examination of the records, the moon rose at 12.13 p.m. on the 18th. Thirteen, thirteen minutes after twelve on the 18th. 30
- Q. That is in the day? A. In the day.
- Q. And do you know when the moon set on that day? A. It did not set on that day, it set early on the morning of the 19th.
- Q. What time? A. At 1.53, seven minutes before 2.00 o'clock.
- Q. Seven minutes before 2.00 a.m.? A. Yes Sir.

HIS LORDSHIP: Set early in the morning at what time? A. 1.53.

HIS LORDSHIP: A.m.? A. Yes Sir.

MR. KIRLEW: Now, when you say that the moon set, could you define precisely what you mean, where does it go when you say it sets?
A. When the upper rim of the moon actually is below the sea level.

Q. When it is below the sea level? A. Yes Sir.

10 Q. Suppose there are mountains, I am here and the moon sets, I am looking at the moon setting but there are mountains between myself and the moon, how would that affect the time of setting?
A. It wouldn't affect the time of setting but the type of lighting.

Q. It would affect the light? In other words how would it affect the light, my seeing the moon?
20 A. The mountains would make it darker before the time of setting.

HIS LORDSHIP: The type of lighting is affected by the height of the mountains? So that means according to you that it would be darker before the actual time of 1.53? In other words it meant that there was - that it is possible that there was no light by the moon before 1.53?
A. Yes Sir.

30 MR. KIRLEW: Now think of the Palisadoes road for instance, along the Palisadoes Road. Now between the Palisadoes Road and the point where the sun sets - the moon I mean, the moon sets in the sea, would there be any mountains or anything to come in between the moon and a person on the Palisadoes Road?
A. Well you are looking west actually there are some hills to the west and those could form obstruction to the moonlight especially when it was setting.

40 Q. So the moon would go behind those hills before 1.53? A. Yes Sir.

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Q. Now can you say what quarter the moon was in then, first quarter, second quarter?
A. Well we had the first quarter on the 17th of the month, about 10.57 a.m. so that the full moon was on the 24th, so the amount of light would tend to increase because you had the full moon on the 24th, so a fraction of the full moon you would get say on the 18th.

10

q. So if you had any twilight from the moon after it had set....
A. Very little, I would rather say none.

Q. So when once it had set there would be no glare coming from it again? A. No Sir.

Q. Now, what would you say the conditions on the Palisadoes Road would be at say 2.00 o'clock or 2.16 that morning, would it be bright, dark or what?
A. I would say it would be dark.

20

Q. You would say it would be dark?
A. Yes Sir.

Q. Thank you.

HIS LORDSHIP: Yes.

Cross-
examination.

CROSS-EXAMINATION BY PROSECUTOR:

Q. All this information about the moon can be found in any good diary can it not?
A. In a good diary, yes.

Q. But you yourself were not making any actual calculation on moonrise or moonset were you? A. Except as obtained from it.

30

Q. Except from the book? A. Yes Sir.

Q. Has latitude anything to do with moonrise and moonset? A. Yes Sir.

Q. The tables that you have are based on these latitudes? A. Well the tables I have are worked out at cold latitudes at intervals of 10 degrees.

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Cross-
examination.
(Contd.)

- Q. In the book you have there? A. Yes Sir.
- Q. The moon had already passed the first quarter, hadn't it? A. Yes Sir.
- Q. On the 17th? A. Yes.
- Q. This was the 18th? A. Yes.
- Q. It was a waxing moon? A. Yes Sir, waxing.
- Q. Whether or not there is an afterglow to the moon would depend on where it sets, doesn't it? If it sets in the sea you would be more likely to get a longer afterglow than behind a hill?
A. We always consider setting at sea level.
- Q. Yes, wouldn't you get a longer afterglow if it hits the horizon, the sea?
A. If you call it afterglow I would say there would be no obstruction at all
- Q. You don't know what particular place along the Palisadoes Road Mr. Kirlew is talking about do you? A. No Sir.
- 20 Q. On the night of the 18th of February going on to the 19th, you were not out on that road were you? A. No Sir.

HIS LORDSHIP: If he were?

PROSECUTOR: I have confidence in the answer m'lord. Now then, you are familiar with the area aren't you? A. Yes Sir.

- 30 Q. Does the light from the City - can you see them from the road, the lights from the City across the way?
A. Yes, you can see the lights from the City. You can see the lights in the City.

- Q. Would those lights in any way affect the visibility out there?
A. I don't think so. The minimum distance across the harbour is about two miles.

- Q. Tell us something. Some nights are lighter than others, notwithstanding there is no moon, isn't it, depending on the weather?

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(Contd.)

A. Yes Sir, that is true.

Q. Can you say whether the night of the 18th
of February was a fair night or not?
A. Yes, it was fair.

Q. Was a fair night? A. Yes Sir, fair in
the sense, if I may qualify, when we say
fair we refer to the amount of clouds
present.

Q. I am not asking you anything more.

Re-
examination.

RE-EXAMINATION BY MR. KIRLEW:

10

Q. I am asking you to explain what you mean
in respect of fair night

HIS LORDSHIP: So you are re-examining?

MR. KIRLEW: Yes Sir. When you say it is a
fair night, would you explain that?

A. It doesn't mean the complete absence of
clouds because there were some amount of
clouds in the sky during that Octo, but
what we consider an Octo - the sky to be
divided into eight parts....

20

Q. We won't go so much into that. You say it
was a fair night, and now you say it was
dark.

A. The dark night, I wasn't referring to
the clouds, I was referring to the moon-
light.

Q. And now when you say the fair night you are
referring to the clouds. A. The clouds.

Q. Did I understand you to say there was an
absence of clouds?

30

A. Not a complete absence of clouds, but
less than one-eighth of the sky covered
with clouds during that period.

Q. Alright, thank you very much.

HIS LORDSHIP: Yes Mr. Kirlew?

MR. KIRLEW: May it please you m'lord, that is the case for the Defence, Sir.

HIS LORDSHIP: Yes Mr. Kirlew.

MR. KIRLEW: M'lord, I don't think it will be long. I would address tomorrow or this afternoon. I don't know if it will suit the Court.

10 HIS LORDSHIP: I am ready at any time, up to the 'fair' side of the night. If you want to make an application, that is another matter, I will consider it. Do you wish to ask for an adjournment to start your address tomorrow morning?

MR. KIRLEW: Yes m'lord.

HIS LORDSHIP: What do you have to say Mr. Director?

PROSECUTOR: Let nothing be done to fetter my learned friend.

20 HIS LORDSHIP: I didn't ask for a speech. Well Mr. Kirlew I will give you an opportunity to review and to put your matters adequately.

MR. KIRLEW: I am much obliged.

30 HIS LORDSHIP: Mr. Foreman, Members of the Jury, on Mr. Kirlew's application I am granting an adjournment at this stage until tomorrow at 10.00 o'clock when we resume the hearing of this case. In the meantime do not discuss this case with anyone or among yourselves. Do not allow anyone to influence you. Adjourn the court until tomorrow morning at 10.00 o'clock.

In the
Supreme Court

Defence
Evidence

No. 18

Percy Claude
Muir.

Re-
examination.
(Contd.)

Adjournment taken at 3.05 p.m.

In the
Supreme Court

No. 19

No. 19

Summing-up, 21st November 1967.

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21st November
1967

SUMMING-UP OF HIS LORDSHIP MR. JUSTICE EDUM:

Mr. Foreman and Members of the Jury, the accused is charged with the offence of murder. The particulars of offence are, that Maloney Gordon on the 19th day of February, 1967, in the parish of Kingston, murdered Andrew Barton.

You are the sole judges of the facts, and you have to come to your conclusions not upon what you may have heard or read outside this courtroom but upon the evidence given in this court from the witness box and from reasonable inferences to be drawn from the evidence and exhibits produced in court. You ought not to be swayed by any emotion nor should you take into account sympathy either for the accused or for the relatives of the deceased person. As judges of fact you may accept the whole of a witness' testimony or reject the whole of a witness' testimony. You may accept a part or reject a part of a witness' testimony. You, as I have said are the sole judges of the facts. If in the course of my summing-up this case to you I express any views as to what facts you may accept or as to what inferences you may draw, you are not bound to accept such views or draw such inferences but if you do agree with them, you may adopt them as your own. similarly, with regard to speeches of counsel, you are entitled to accept or reject any of their submissions and substitute your own views provided, of course, these views are in accordance with the evidence and any reasonable inferences to be drawn therefrom.

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So far, however, as the law is concerned, you will take your directions of law from me. Having decided what facts you believe and what reasonable inferences you draw you then apply the law as I tell you and come to your conclusions as to the guilt or innocence of the accused person.

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In this as in all criminal cases where the

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accused pleads not guilty the prosecution must prove the guilt of the accused beyond a reasonable doubt. Accordingly, the accused who pleads not guilty throws on the prosecution the burden of proving that the facts alleged in the indictment are true. The onus is always on the prosecution, it is not for the accused to prove his innocence but for the prosecution to prove his guilt. The accused is deemed to be innocent unless proved guilty by the prosecution. The prosecution, however, need not prove the case with complete certainty. It is seldom in human affairs that one can attain such a degree of proof, the requisite standard is that the prosecution must prove the guilt of the accused beyond a reasonable doubt, and a reasonable doubt is not a mere flimsy or fanciful doubt but that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. In other words, the evidence must convince you so that you feel sure of the guilt of the accused before you can return a verdict of guilty against him.

What is murder? Murder is the unprovoked gilling of another without lawful justification or excuse, with the intention of killing or causing really serious bodily harm likely to cause death and from which death results. In order to establish the offence of murder the prosecution must satisfy you beyond a reasonable doubt that -

- (i) that the accused dealt the blow or blows which caused the injury or bodily harm to the deceased;
- (ii) that the deceased died as a result of the injury or bodily harm;
- (iii) that the accused dealt the blow or blows voluntarily, deliberately, that is, consciously, and under no duress or compulsion by anyone;
- (iv) that the accused did so with the intention of killing causing really

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serious bodily harm from which death was likely to result and did result;

- (v) that the killing was unprovoked; and
- (vi) that the killing was without lawful justification or excuse, that is, that the killing was neither the result of an accident nor as a result of the accused acting in self defence.

First of all, you must be satisfied beyond a reasonable doubt that the accused dealt the blow or blows which killed the deceased. That is an important question of fact for you to decide. If you believe that he did not, you have to acquit him. If you have any reasonable doubt as to whether or not the accused dealt the blow or blows which killed the deceased, you are to acquit him. If you are satisfied beyond a reasonable doubt that it was at the accused's hand that the deceased met his death, then you proceed to consider whether the killing was intentional, unprovoked, and without lawful justification or excuse. From the issues raised in this case it would not be my duty to tell you about provocation, accident or self defence, and so I will proceed to tell you what is meant by 'the intention to kill or to cause really serious bodily harm'. In other words, this is a case which it is either that the accused person is guilty of murder or not guilty at all.

Intention is not capable of positive proof. It can be inferred from the facts and circumstances of the case. As a general rule, a man is presumed sane and may be taken to have intended the natural consequences of his act. For example, if a man takes a lethal weapon and inflicts a deliberate cruel blow at a vulnerable part of the human body you may well ask yourselves if death or really serious bodily harm was not intended in those circumstances. Also, for example, if the accused had fired or exploded a loaded firearm not in accident or self defence at a short range at a human being you may well conclude that death or really serious bodily harm was intended. Thus, if the accused struck deliberately, that is, being conscious, intentionally, that is, neither in

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accident nor in self defence and the weapon with which he struck the blow was likely to cause death or really serious bodily harm, you are entitled to infer that the accused intended to kill or cause really serious bodily harm. Any inference, however, is one of fact and is rebuttable. If therefore, on all the facts of the case there is evidence which shows that it is not the correct inference to draw then that inference should not be drawn. The prosecution, as I have said, must satisfy you beyond a reasonable doubt that the killing was done with the intention to kill or to cause really serious bodily harm for the offence to be murder. That intent must be proved by the prosecution as much as any other fact necessary to constitute the offence and the burden remains throughout on the prosecution. If on the totality of the evidence there is room for more than one view as to the prisoner's guilt or you think either that the intent did not exist or you are left in doubt as to that intent, the accused is entitled to be acquitted of the offence of murder.

Now let me see how far I can help you so far as the facts are concerned. Allan Barton gave evidence on oath and he said that he is a merchant and the deceased was his nephew. At the time of the deceased's death he was nineteen years old - the deceased was nineteen years old. On the 19th of February, 1967, at about 3.20 a.m. he received certain information and he went to the Palisadoes road in Kingston. On a track on the left of the road he saw the dead body of his nephew, Andrew Barton. Later that day he identified the dead body of his nephew to Dr. Martin who performed a post mortem examination on that body.

Do you accept his evidence or you do not? If you accept the evidence then do you believe that the man Andrew Barton is dead and that Dr. Martin performed a post mortem examination on that body.

Camille Chung next gave evidence on oath. She said she is eighteen years old and she lives in Kingston 10 and that she is now working as

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a secretary, and I quote from my notes of her evidence: "I knew Andrew Barton. On the night of the 19th of February, Saturday night, I went to the Drive-in at Harbour View with the deceased to the late night show beginning at 9.15 p.m. After the show was over we went along the Palisadoes road in an M.G. Sports car. The deceased drove. He stopped and parked on the left side of the road facing the airport with the front of the car facing the road. We remained in it for some time. We left and went behind the car and sat on the beach facing the sea. About 2.00 a.m. about five boys came from behind. At first when I saw them they were about five yards away. They were close together. I was still sitting. I spoke to the deceased; we both got up and turned around. They were standing in a semi-circle in front of us. Two held on to me by my hand and three held on to the deceased. The two spoke to me, the three drew the deceased away and struggled with him. I tried to get to the car; I got to the car. I got in. The deceased and the three men were on the right side of the car about two yards away. I could see what was happening. The accused was one of the three men. While struggling and when I was in the car the deceased spoke. The deceased told them to take everything he had. I called the deceased from the car. The men could have heard. I could see the men clearly. I cannot remember if they did anything. They were still struggling. They were holding the deceased, one of them had a gun, a short gun. I can't remember which one had the gun. The deceased said that he had a gun too. They were still struggling and then I heard a shot. The man with the gun was there. The deceased continued struggling and I heard another shot then the deceased fell. Before the deceased said take all that he had, I did not see him with any gun that night as far as I know. The deceased fell after the second shot. I was shouting. A car was passing, they went ahead and turned back and the fellows ran. I went to the deceased who was bleeding from his chest. I spoke to the men in the car that came up. They left and two other cars came along. The police came. Barton, the deceased, was dead when the police came.

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That was about twenty minutes after the boys ran".

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10 She said that the deceased had on white shirt and white shorts, and those were tendered in evidence as Exhibit 1. She did not see the hole that is presently on the shirt before the incident. There was blood after the shots were fired, on the shirt. Then she said that the watch, Exhibit 2, she had seen it and she does not remember where the watch was when the deceased fell. She spoke to Sergeant Hanson and then she left with the police.

20 "On the 28th of April, 1967, I attended a parade and pointed out one as the one who shot the deceased. I see him here today, the taller one, (and she pointed out the accused Gordon). I didn't know any one of them before. I pointed out the accused Gordon as the one who shot the deceased. I think he was the one who had the gun".

30 Well, she was cross-examined, and she said that they were about ten yards away from the car and there was this struggling in one area and then she said that afterwards the struggling came up to an area of about six yards. She pointed out the distance of six yards as being from the box to the table. Then she said that "I would not say it was dark. The car lights were not on. No street lights; I can't remember if it was moonlight. I could make out the features of people". Then she said in answer to questions under cross-examination that the accused Gordon was one of the three persons holding the deceased. Two of the men were slim, they were of medium height, they had on dark clothing. She cannot remember anything particularly about them. They were all of the same complexion. One was shorter. She said she saw no picture of any of the suspected persons or where they were before they went on the parade. That is meant to say that if she had a preview of any of the suspected persons then, of course, there was no sense in holding an identification parade. That, of course, is the point suggested, but she said she saw no picture or knew any of them before the parade. Then she said she is almost sure that there were about

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five. She is not absolutely certain, there could have been six but not as many as seven. She said she was afraid but not terrified. She was not calm. She was struggling and her concentration was to get away and get to the car. Apparently that meant that in her agitated state of mind how could she be certain of any person when she said this person did so and so. That is a question for you to accept of course.

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Then under re-examination she was asked how many persons held her and she said two. How many persons held the deceased, she said three. And the point on behalf of the crown is that two and three cannot possibly mean six therefore whether or not she is certain about five is not that a way in which certain persons speak, knowing that there may be five, say, about five, or perhaps, it is a kind of way of talking in order to give a fair estimate of what she is probably giving of the evidence. Well, that is a question for you. Then she said further under re-examination that the deceased person had on white clothes. Probably that is meant to say that if the others had on dark clothes then she was quite able to see the movements of the deceased person. Then she said that the other two persons were a bit shorter than the accused Gordon and that Gordon, the accused Gordon, is of average height. Whether average or medium mean the same thing or not, well you are asked by the defence to consider whether in those circumstances it is any effective means to describe any person to come and say well, so and so is an accused person or that person did something. She said too that there was only one of the men that had the gun and the gun never changed hands. Well, that is the evidence of this witness, and it is an important bit of evidence.

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Well, now, you are judges of the facts. Do you accept her evidence or do you reject her evidence? If you reject her evidence, that would be the end of the case. If you have any reasonable doubt as to whether or not she is speaking the truth, that would be an end of the case. If, on the other hand, you accept her evidence well now, you ask yourselves:

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do you believe that it was the accused person who shot the deceased Andrew Barton? Of course, arguments are directed to you to consider various forms of submissions. It is stated by the defence that she had said to you in examination-in-chief "I can't remember which one had the gun", but, however, on the 28th she was able to point out the accused person as the one who shot the deceased. You are
10 being asked by the defence to consider those circumstances and to say what had happened since the time that she was there to the identification parade when she first said she could not remember who had the gun or who shot the deceased and come to the identification parade and say "this is the person who shot the deceased". That is a question of fact for you. I am not telling you how to regard the evidence or how not to regard the evidence,
20 but identity is an important issue in this case and it is my duty on certain aspects of the facts to draw your attention to some that you can consider salient features of the facts, but this I must tell you that if you have any reasonable doubt as to whether or not this witness is speaking the truth, well then, you will have to acquit the accused person but remember that the onus is on the prosecution to satisfy you of the guilt of the accused
30 person beyond a reasonable doubt before you can return a verdict of guilty against him.

Well, then, of course, the crown is saying that if you believe that it was the accused person who shot the deceased, Andrew Barton, then of course, from the circumstances the prosecution are asking you to say that it was unprovoked, that the accused person could not have acted in self defence nor was it an accident and in those circumstances
40 what you have, if you believe the accused person shot the deceased, Andrew Barton, is that man taking a loaded firearm shooting another at a vulnerable part of the human body - of his body, that in those circumstances the prosecution are asking you to come to no other conclusion but that if the accused person did that he had the intent to kill or to cause really serious bodily harm to that person. That is what the prosecution are asking you to say; and if that is so, you agree, then they

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would well have made out a case to your satisfaction beyond a reasonable doubt as to the offence of murder. But, of course, you cannot just be guided by one set of evidence, you have to consider the case as a whole.

Gifford Linton gave evidence on oath, but he spoke more or less of an identification parade held on the 20th of April, 1967. There was one point made of his evidence by the defence, and I will tell you what his evidence is on that aspect, that is, that the witness Camille Chung was called on the parade. He spoke to her in the presence and hearing of the accused, that was Barth, and she said she came there to see if she could identify anyone in the parade as one of about six who held her up along with Andrew Barton along the Palisadoes road about 2.45 a.m., and that is the purpose why she was there. The point was made how is it this witness was speaking of six and the question of five, six and seven, those numerals crop up in this case. Simply, the point is being made as to whether or not you can be sure of identity in those circumstances. You probably will remember the question that she said she could not remember whether it was moonlight or not. 10 20

Winston Facey next gave evidence and he said he was an Inspector of Police, Central Police Station. On the 20th of April, 1967, he held an identification parade at the Central Police Station. Two parades were held. At the first parade at 1.30 p.m. he had nine men including the accused Gordon. They were similar in dress, height, colour and appearance. "I told him that he was involved in a case of murder of Andrew Barton, and he was asked whether or not he wanted any Barrister or Solicitor or friend to represent him on the parade and he said that he wanted Mr. Gayle, a Barrister. Mr. Gayle attended. Then - I continue - "I told him that he could change his clothes or take up any position, he occupied the fourth position from the left; he changed his clothes with the number one person. The witness was in another building. The witness, Camille Chung, was summoned and she came. I asked the witness Chung if she knew 30 40

what was the purpose of the parade. She said to point out the man who shot Andrew Barton on the 19th of February, 1967, along the Palisadoes road. I told her to walk along the line and if she saw him she should touch him. She walked along the line and touched the accused, Gordon, and said "this is the one who had the gun". The accused made no statement. In those circumstances silence is no admission of guilt. The parade was dismissed.

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10 He was cross-examined and asked about how she knew of the purpose of the parade, he said that he did not tell her, all his duty was to ask her why she was there. Of course, the point is made by the defence that if she had said she cannot remember which one had the gun, what had happened since and then for her to know what was the purpose of the parade, that is, it is the reasonable inference to draw that
20 somebody must have told her concerning the purpose of the parade and probably the suspected person. That is what is contended by the defence. Then the witness was asked about the telephone - the witness had to be telephoned to come there, and there was an aperture in the window or door, as the case may be, and it was suggested that there was a signalling in order to give the clue as to his identity. This witness said no such
30 thing ever happened, no signal was made at all.

And he was re-examined and said throughout the parade the Barrister Gayle was present. Well, by that, perhaps, you may well come to the conclusion or consider whether or not it was a fair parade. If it was a fair parade you must ask yourselves what reliance or weight you will place on the evidence as to the important issue of identification
40 of the accused person.

Jezz Marston next gave evidence on oath and he said he is a Detective Deputy Superintendent of Police, C.I.D. Headquarters, Kingston. On the 25th of April, 1967 he was in possession of certain information and he went to 18 Swettenham Road at about 6.00 a.m., in a party, and in a room he saw the

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accused Gordon and two others and he took them in custody and handed over Gordon to Detective Hanson.

He was questioned and asked if he knew one Howard Simmonds, and you heard too that man was called by another name 'Howie', and that man is now dead.

Do you accept the evidence or not, and if you do, what reliance you place - what weight or value you place on the evidence.

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Detective Sergeant Terrence Hanson next gave evidence. He said that on the 19th of February, 1967, at about 3.00 a.m. he received a telephone call and went to the Palisadoes road near to the eighth mile post. On a gravel pathway about ten feet from the main road on the left he saw the dead body of a man lying on its back, head to the east, feet to the west and that body was dressed in white shorts, long sleeve white 'ghanzi' shirt. There was a shoe on one foot and about eighteen feet from that foot there he found another shoe and the broken wrist watch, Exhibit 2. There was a car and he saw blood on the body and a hole at this spot of the 'ghanzi' shirt, and he demonstrated which spot. The man appeared dead. He later saw Camille Chung. He contacted Dr. Martin. The body was removed, and later he attended a post mortem examination performed on the dead body by Dr. Martin, and the body was identified by Allan Barton as that of Andrew Barton, his nephew. The clothes were tendered as Exhibit 1 and the watch as Exhibit 2, and the watch at that time and now shows 2.16. Probably the importance of that, if there is a reasonable inference, is that from the struggle the watch had been jolted and stopped, that perhaps it is a fair indication to the time when certain things happened on the Palisadoes road that morning.

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Then, he said, the Doctor took out from his chest a spent bullet and he put it in a bottle and initialled the bottle and the Doctor initialled the bottle too, so as to make

sure where the bullet came from and to give evidence concerning it. On the lower portion of the leg there was another bullet and that the witness placed in a bottle marked "B". Dr. Martin initialled the bottle that is marked "B". Well, the bullet "A" is Exhibit 3 and the bullet "B" is in evidence as Exhibit 4.

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10 On the 2nd of March, 1967, he took the sealed bottles to Jack Morris, Ballistic Expert, who carried out tests and he also took the clothing and in his presence the Expert made certain examinations of the clothes. He was handed back the shirt and later the bottles. Subsequently, he arrested Gordon on the 29th of April, 1967, for the murder of Andrew Barton at the Flying Squad Office, C.I.D. Headquarters. He said when he got to the Palisadoes road at about 3.35 a.m. that morning the visibility was clear. The moon was shining, and it supplied sufficient light for him to see clearly. When he saw the deceased he was lying on his back.

20 He said he knew one Edward Thompson, and he is younger, a shade clearer, smaller in stature than the accused, Gordon, Garth Williams too he said is fairer and shorter and the same in size and younger than Gordon. When he arrested Gordon, Gordon was slimmer than he is at the present time. Asked about the moon he said yes there was moon in the sky but he cannot say what particular part of the sky this moon was. You are asked to say that if there was a moon around that time, 2.16 a.m. then most likely there can be some assistance by means of the moonlight according to this identification by Camille Chung. If there is none, it would be still a matter for your consideration whether or not you believe the evidence of Camille Chung.

30 He said he had seen a photograph of Howard Simmonds and that he was a person of dark complexion, five feet eight and a half to five feet nine in height, not stout, but stouter than the accused, Gordon. He was not about the same size as Gordon. Simmonds is dead. Simmonds was shot. Well, this is the evidence of this witness Hanson.

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Do you accept his evidence or you do not? If you accept his evidence, then of course, you will ask yourselves: was there a bullet taken from the body by the Doctor - those two bullets? And if they were, so can you come to the conclusion whether or not the man, Andrew Barton, if he is dead, died by means of the bullet entering his body? Then of course, you will consider the question of these Exhibits being given and handed to the Ballistic Expert. The Ballistic Expert also gave evidence too, and so you will ask yourselves as to the import of the evidence and consider what weight and value you will place on his testimony.

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Reuben Robertson gave evidence. He was recalled and then sworn. He said on the 29th of April, 1967, about 8.30 a.m. he was at Flying Squad Office. He received information and he went to the cells at the Central Police Station and saw Maloney Gordon. There was a talk, he said to him: "Mr. Rob. me never shoot Barton, 'is Howie do it. Take a statement about what I know'. The witness said "I cautioned him, he said 'Me want to give a statement'. I took him out of the cell, took him to the C.I.D. Office. I telephoned one Mr. Aston Hamilton and he arrived about ten minutes later. I spoke to Gordon and told him that Hamilton is a Justice of the Peace and I told Mr. Hamilton in the presence and hearing of Gordon, that he is a prisoner charged with murder and he wants to make a statement. Immediately after, Gordon said, 'Inspector, me nah bother make the statement' and Hamilton left. While I was taking Gordon back to the cell by the passage, he said to me 'Look here sir, me nuh shoot a soul, call the Justice make me make a statement'. Hamilton was called and on his arrival in the presence and hearing of Gordon, I told Hamilton that Gordon said he wants to give a statement. Hamilton asked Gordon if that was so, he said 'Yes'. Hamilton asked Gordon if anyone forced him to make the statement and Gordon said 'nobody force me to do it; me never like you colour because you a brown man'. I wrote the caution on a foolscap piece of paper, explained it to Gordon and read it over to him and asked him if he understood and I invited him to sign

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it, he did so, and it was witnessed by
Hamilton. I told Gordon he was at liberty to
write the statement himself or if he wanted
anybody else to write it, he said I must write
it. I wrote the certificate to that effect,
read it to him, he said he understood it and
he signed it. It was witnessed by Hamilton.
Gordon then dictated a statement, which I
wrote down as he dictated, in his own words.
10 After he said he was finished I gave it to him
to read, he said I can read it and handed it
back to me. While I did so, he made certain
corrections which I invited him to initial
and he did so, witnessed by Hamilton, and
Gordon signed each page, witnessed by
Hamilton. I appended a certificate at the time
of taking the statement. I never used force
or threatened him to make a statement. I held
out no inducement or any threat to him to force
20 him to make the statement. He was in custody,
however, that was on the 29th of April, 1967."
This is the statement, tendered as Exhibit 5.
The statement was read to you in evidence.

He was questioned and he said: "in the
statement where the accused said 'we searched the
man' it is not true that he said 'we searched
the beach' "

Do you accept his evidence or you do not?
If you accept the evidence then ask yourselves:
30 Was the statement made by the accused? The
question of voluntariness of the statement is
not challenged and is not in issue, so far as
the voluntariness of the statement is
concerned. However, as judges of facts you
are to consider the statement and consider the
truth or not of the things contained in the
statement and if it is true then you will give
it what weight or value it deserves. However
the statement is there, you can take it and
40 consider it if you wish to have it when you
retire to consider your verdict, but in effect
he was saying that he was around the place -
on the Palisadoes road with certain friends
but it was Howard Simmonds who did the
shooting and that he had no part in the
shooting whatsoever. Perhaps it may be stated
on behalf of the defence that it is part and
parcel of the prosecution's case. Well, on
behalf of the prosecution it is said that it is

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in the interest of justice for every bit of evidence for and against an accused person to be placed before you, the jury, and the evidence is placed. But, nevertheless, you are the ones to consider what you believe. You may accept part of a witness' testimony or reject part of a witness' testimony or you may accept the whole of it or you may reject the whole of it; you are the judges of the facts. You may probably be asked to consider this statement - as stated by the prosecution - that there is no doubt from the statement - it is a part of the prosecution's case - that the accused person, Maloney Gordon, was around the area where the girl Camille Chung and Andrew Barton were, and if that is so, the prosecution are asking you to consider that you may reject the fact that the accused person says that Howard Simmonds did the shooting, and they are asking you that in the circumstances, if you accept the evidence of Camille Chung, that although he was present for some other purpose, that he was the one who had the gun and at whose hand Andrew Barton met his death. Those are matters for you to consider.

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On the other hand the defence is saying, in the circumstances that he is giving the statement - part and parcel of the prosecution's case - and that it ought to be considered that the accused person was not the one who did shoot Andrew Barton, and they are saying that you ought to have a reasonable doubt having regard to the statement and having regard to the evidence of Camille Chung; that you are in a state of reasonable doubt as to whether or not the accused person did, in fact, shoot Andrew Barton. Well, that is a question of fact for you, but I must tell you if you have any reasonable doubt you have to acquit the accused person.

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John Martin gave evidence on oath. He said he is a Registered Medical Practitioner, and Medical Officer for Kingston. On the 19th of February, 1967, he performed a post mortem examination on the body of Andrew Barton, identified by Allan Barton at the post mortem examination.

Externally there was a bullet entry wound a quarter of an inch in diameter about two inches below the left nipple and about two inches from the sternum - breast bone. There was another entry wound in the left leg about quarter inch in diameter.

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10 On dissection on site of the first bullet wound it was seen to enter the chest between the fifth and sixth rib, going upwards, piercing the covering of the heart entering the left ventricle, filling the pericardium and the left chest with blood. It then ricocheted downwards, crossing the midline of the chest going downwards to the top of the right lobe of the liver and lodging itself between the twelfth rib under the skin where it was removed. Then he placed it in a bottle and handed it to Detective Hanson, that is, Exhibit 3.

20 As to the second entry bullet wound, the pathway was as follows: it smashed its way through the hip bone, went through the sacrum and lodged under the skin. He removed, placed it in a bottle and gave it to Detective Hanson - that is Exhibit 4.

30 He is of the opinion that the cause of death was damage to the heart by the bullet and massive haemorrhage into the chest. Well, he said in evidence that if the first shot was the one to the heart there should be a brief struggle, but if the first shot was the one to the leg then the struggle could have lasted about ten minutes, but, of course, he cannot say from the examination which was the first bullet that was fired into him.

40 Do you accept this evidence or you do not? You will consider that fact as to his opinion. Well now, he is a doctor and he is giving his opinion as to the cause of death, still, in the finality it is a question of fact for you. Do you believe that Andrew Barton is dead or not: that he died from natural causes? You are being asked: are you satisfied beyond a reasonable doubt that he died from the bullet wound? You may well be satisfied that is so, but the question

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Summing-Up
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1967 (Contd.)

as to who did it is another matter, having regard to the evidence before you.

Jack Morris gave evidence and he stated that he had certain education in the ballistic field and he gave an account of his experience and his education in that field and he said that Detective Sergeant Hanson on the 20th February handed him two deformed bullets - and those were Exhibits 3 and 4. He performed certain examinations, made certain findings, and from those examinations he said that those two bullets were both fired from the same gun, the measurements disclose that they were fired from a Smith and Wesson .38 calibre revolver. Then he examined the clothing - the shirt in particular - for the purpose of finding out whether or not there was any nitrate deposit or particles of nitrate deposit on that shirt. He cut out a piece of the cotton fabric and examined it under a microscope and he conducted experiments with the bullets and he is of the opinion that the muzzle of the revolver had to be almost in contact with the article within six inches or less, practically half an inch or less from the article - the garment. He did not examine the trousers but he gave certain measurements of the hole in the trousers.

10

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Do you accept his evidence or not? Well, from his evidence as to his experience and education it is a matter for the court to say whether or not he is an expert. But, nevertheless, if the court decides he is an expert, it is a question as to whether you accept his testimony or not. You are the sole judges of the facts and in the finality it is you who will have to find the facts, that is: (1) were those two bullets fired from a gun; and if they so fired, having regard to the fabric containing particles of nitrate deposit, that is, powder marks, do you believe that the gun was held in a place not further than about six inches away from the shirt and body wearing that shirt. If that is so, then you will ask yourselves if a person taking a gun and shooting in those circumstances whether or not that person would have had the intent to kill or to cause really serious bodily harm. Remember, in the finality,

30

40

it is a question of fact for you. On the other hand, if you have any reasonable doubt or you do not accept his opinion having regard to the evidence he has given you then, of course, it is the end, and that opinion will have to be rejected, and you will look to the other evidence for the proof of the prosecution's case. That is the case for the prosecution.

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10 The accused, Maloney Gordon, gave
evidence on oath and he said, I quote:
"On the 18th of February, 1967, some time
at night, I was at Glaspole Avenue. Howard
Simmonds came along driving a car. He
stopped, spoke to me, he said: 'come let
us go for a drive'. I agreed to go. There
was no one else in the car. I knew Simmonds
before for a long time. We used to go to
20 school together. The two of us have the same
height, same complexion. About one or one
and a half chains we see five more fellows,
him stop, them talk about going for a drive
and if they were coming, they said yes.
Howard Simmonds drove the car. There were
seven of us, Dennis Barth, Garth Williams,
Edward Thompson, me, Howard, Trevor and
Maurice. He drove to the airport round-about
and turned back. We saw a little red car parked
over the big sea side of the road. Howard
30 drove to the bottom side of the car and stopped.
He said 'mck we go for some money from the
people in that car'. Everybody talk, not that
them come for is only for a drive. He said if
anybody not coming they have to walk home
back. We came, all of us, all seven, we start
to go with him. The red car park with front
to the road side and back to the sea. We
didn't see anyone there. Howard and Maurice
walked down by the sea. Them say 'see two
40 people here'. We all go down to see where
the two people were. Dennis and Junior take
away the girl, the other five of us was
talking to the man. Nothing never take place.
Well, two of us leave like from where I am to the
table in court. I don't know what happened
between the three of them and the man but a
wrestling started between them and the man.
I turned back, and I saw Howard and the man
close up together. I take away the man from

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Supreme Court

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1967 (Contd.)

Howard. I hear Howard say 'you lucky I didn't shoot you'. I took away the man from the distance from about the box to the first bench in court. He was standing there alone, he said to me 'the money that your friend want down there on the beach' where the two of them were sitting down. Me and Garth go down by the beach to see if we can find the wallet, we did not see anything at all. When we coming up back I said to Dennis and Junior to let go the girl and come. We started to walk towards the car. I did not have to pass anyone when I was walking towards the car with Garth - the car from which we went in - I heard a shot. We looked back and we run towards Howie. My intention was to stop him from firing another shot. Before I reached him I heard another shot and the man dropped. We all run away and go to the car. 10

I did not know Howie had a gun. I did not know even when we came out of the car that Howie had a gun. I first knew when he said 'lucky I never shoot you'. We did not search the man. The whole of us say he shouldn't do it, and if the police ask, we going talk, and Howie say if anything happen like that he going shoot somebody. At the time the shot was fired, the back of the car was from the box to about the second bench in court. 20

He was cross-examined and he said that he was not one of them. He never shot the man at all. And he was asked about mentioning those two persons, Maurice and Trevor, in the statement. He said that he did mention them in the statement but they were not down. He said he did tell the police about Maurice and Trevor but that was not put in the statement. I understood, he said, that 'to go and look for money' was 'to rob them'. And he said, if we did not go then, of course, we would have to walk back home. The prosecution is asking you to say in those circumstances what a trivial excuse to say that in order to be taken back home, he went with them, if in fact he intended not to go to the people on the beach. He never heard Howie stick up the man with the gun. Then, he said, why the girl pointed him out was the fact that his picture was shown to her before 30 40

the parade. He said he never heard the man 'take everything that I have'. That is the evidence of this accused person.

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Summing-Up
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1967 (Contd.)

10 In effect he is saying that he did not shoot anyone, what he is saying is that Howard Simmonds was the man who shot at the deceased, Andrew Barton, but that he was not party to any shooting at all, and that the first opportunity when he knew that Simmonds has a gun he, in effect, more or less, pulled away Barton so as to protect him.

20 If you believe that, you will have to acquit the accused person. If what he says causes you to have any reasonable doubt, then you will have to acquit the accused person. On the other hand, you, as judges of fact, may well reject the statement given in evidence - he has given. If that is so, you are not thereby justified in returning a verdict of guilty against him. You have to go back to the prosecution's case to study its strength or weakness. On the other hand, you may accept a part of his evidence and reject a part. You accept that he was there and he was the man who had a gun and shot Barton. If you come to that conclusion, then I must tell you further certain aspects of the law concerning malice, that is, the intent to kill or to cause really grievous bodily harm. Now
30 the law is this: where a person kills another in the course of the furtherance of some other offence, the killing shall not amount to murder unless it was done with the same malice aforethought, expressed or implied, that is, if it is done with the intention to kill or to cause serious bodily harm. That is required to amount to murder when not done in the course of the furtherance of another offence. The effect of that portion of law is that where
40 a killing has been done in the course of the furtherance of another offence that other offence must be ignored and the circumstances surrounding the actual killing only must be considered. So to constitute murder it must be proved that independent of the other offence the act which caused death was done with the intention to kill or to cause really serious bodily harm. In other words, if you come to

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the conclusion that the accused person did shoot the man, Andrew Barton, in order to assess his intent to kill or to cause really serious bodily harm, the law says you are not to take into account the fact that there was an intention to commit another offence, such as, robbery. You have to consider the act of killing, that if that was done, well did the accused person have the intent to kill or cause really serious bodily harm.

10

The prosecution are saying - they are asking you to say - that if the accused person had the gun, held it to the vulnerable part of his body and pulled the trigger, in those circumstances could not death or really serious bodily harm be the only intention of such a person? So let me remind you then that if you believe what the accused person said, you have to acquit him. If what he says causes you to have any reasonable doubt, you will acquit him. Even if you reject what he says, you still believe that he was there and that he did the shooting of Andrew Barton, then I told you how to approach the question of intent to kill or to cause really serious bodily harm. If you reject his evidence entirely you are not thereby justified in returning a verdict of guilty against him, you have to go back to the prosecution's case and study its strength or weakness.

30

On his behalf Percy Claude Muir gave evidence on oath. He said he works at the Meteorological Office, Palisadoes, Kingston. He keeps records and from the records and from the authority of the records he knows the movements of heavenly bodies. From the records he says on that night in question the moon rose at 12.30 in the day, that is on the 18th of February, it set early the following morning about 1.53 a.m. "By the moon setting I mean going below the sea level. Well the type of lighting is affected by the height of the mountains and the horizon. If there are mountains, the setting of the moon in such circumstances would be earlier than 1.53 a.m. He said that the first quarter of the moon was on the 17th, the full moon was on the 24th of the month. He said that at 2.16 a.m. on the 18th of February

40

that the night would be dark.

He was questioned, and he said in the circumstances it would be a fair night on the 18th of February, 1967, and by that he means that the sky would be less than one-eighth of clouds.

In the
Supreme Court

No. 19

Summing-Up
21st November
1967 (Contd.)

10 Well, that is his evidence. If you accept his evidence you are asked by the defence that in the circumstances if you believe that there was no moonlight, having regard to the evidence of Sergeant Hanson who said there was moonlight, if you accept that part of his evidence as a person who ought to know and should know the movement of the heavenly bodies, if you believe it was a dark night - that morning around two to two-sixteen a.m. you will ask yourselves what weight, what value you place on the evidence of the witness, Camille Chung. Well, 20 that is the case, as I have said. And even if you reject his testimony that would not justify you in returning a verdict of guilty against the accused person, you go back to the prosecution's case and study its strength or weakness and if from the prosecution's case you have weakness or weaknesses which cause you to have reasonable doubt, then you will have to acquit the accused person.

30 If, on the other hand, the evidence convinces you so that you feel sure of the guilt of the accused person, then of course you would be justified in returning a verdict of guilty as charged. Throughout the consideration of the evidence, in order to arrive at your verdict, you must understand that there is no burden cast on the accused person to satisfy you of his innocence. Throughout the case the burden is on the prosecution to satisfy you of the guilt of the accused person 40 beyond a reasonable doubt before you can return a verdict of guilty against him.

Is there anything you wish me to add Mr.Kerr?

MR. KERR: No, M'lord.

HIS LORDSHIP: Mr. Kirlew?

MR. KIRLEW: No please, M'lord.

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Supreme Court

No. 19

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1967 (Contd.)

HIS LORDSHIP: Thank you. Will you please
consider your verdict.

Time: 12.29 p.m.

No. 20

Proceedings
22nd November
1967.

No. 20

Proceedings.

Jury retire under sworn guard: 12.30 p.m.

Jury return: 12.51 p.m.

Registrar takes Jury roll call - all present.

REGISTRAR: Mr. Foreman, please stand.
(Foreman stands)

10

Members of the Jury, have you arrived at your
verdict?

FOREMAN: Yes.

Q. Is your verdict unanimous?
A. Unanimous.

Q. How say you, do you find the accused,
Maloney Gordon, guilty or not guilty of
murder. A. Guilty.

Q. You have returned a verdict in which you
have found the accused guilty of murder,
that is your verdict and so say you all?
A. Yes.

20

HIS LORDSHIP: Mr. Kerr, I would like some
evidence as to the age of this accused.

MR. KERR: Yes, M'lord, I feel that is important.

HIS LORDSHIP: Is there evidence available?

MR. KERR: M'lord, apparently it is not here.

HIS LORDSHIP: Yes, I know the provisions of
the Juvenile Law.

MR. KERR: M'lord, apparently this evidence is not now available. I assume, being what it is, it is not difficult to get.

In the
Supreme Court

No. 20

HIS LORDSHIP: Well, you see, I have certain provisions of the constitution to look into.....

Proceedings
22nd November
1967 (Contd.)

MR. KERR: I know M'lord.

10 HIS LORDSHIP: and that is relevant as far as the age of the accused person at the date of the crime, so that is why I must have evidence as to his age. When can you get that? I cannot postpone it any longer today, that is, the sentence.

MR. KERR: M'lord, it seems to me an adjournment until say, 2.30, it would mean Spanish Town and back and a few minutes for research - three o'clock M'lord to be safe.

20 HIS LORDSHIP: In order not to do anything which would perhaps not be in the practice of criminal procedure I would ask you, Members of the Jury, to be present, because this is usual, Mr. Kerr, to have a sentence of this kind passed in the presence of the jury who have delivered the verdict.

MR. KERR: Yes.

30 HIS LORDSHIP: Members of the Jury, I take the adjournment until 3.00, and that is to ascertain the age of the accused person. I believe I will get the information by 3.00 o'clock. May I ask you to return at 2.45 p.m. in order to make yourself available as jurors in this case. We will take the adjournment until 3.00 p.m. The accused, of course, is in custody.

Adjournment taken:

Resumption: 3.06 p.m.

Registrar takes jury roll call - all present.

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Supreme Court

No. 20

Proceedings
22nd November
1967 (Contd.)

HIS LORDSHIP: Yes Mr. Kerr?

MR. KERR: May it please you, M'lord, we have made strenuous endeavours and there is a certificate to hand. As it stands M'lord, it will be necessary for some oral evidence to identify the accused man with the certificate because his name under which he is charged is not on the certificate.

HIS LORDSHIP: You see, the difficulty has arisen, Mr. Kerr, because of Article 20 sub-section (7) saying ".....no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed." Therefore then my duty is, to be satisfied beyond a reasonable doubt that on the date - the 19th of February 1967, whether the accused person was over or under the age of eighteen. 10 20

MR. KERR: I know, sir, it is of cardinal importance.

HIS LORDSHIP: And I do not think I should place Mr. Kirlew in any invidious position in the circumstances.

MR. KERR: Yes, M'lord.

HIS LORDSHIP: When will you be ready?

MR. KERR: Well, M'lord, the mother of the accused man is here, but I have no idea what evidence she is capable of giving. 30

HIS LORDSHIP: Well let the Officer come and produce the certificate and subpoena the mother or somebody to say that these particulars compare favourably with the names of the mother and father of the accused person and then this becomes a question of fact.

MR. KERR: I think the mother is here, M'lord. (To police) Call Violet Gordon please. 40

HIS LORDSHIP: Anyone can produce the certificate under oath?

MR. KERR: Yes, anybody.

In the
Supreme Court

No. 20

Proceedings
22nd November
1967 (Contd.)

No. 21

Wesley Roach - Examination

No. 21

Wesley Roach
Examination.

WESLEY ROACH: SWORN: SAITH: EXAMINED BY
MR. KERR.

Wesley Roach, M'lord.

10 Q. Yes, your office?
A. Detective Corporal of Police stationed at Half-way Tree.

HIS LORDSHIP: Have obtained what?
A. Birth Certificate, m'lord.

Q. Is it a certified copy?
A. Yes Sir.

Q. Copy of the birth certificate of a person in what name? A. Eustace Gordon, sir.

Q. Born when? A. 28th of September, 1948.

Q. 28th. A. Of September, 1948.

20 Q. Yes, where? A. At the Victoria Jubilee Lying-in Hospital, Kingston.

Q. Victoria Jubilee? A. Yes sir, Lying-in Hospital.

Q. Father's name mentioned? A. No sir.

Q. Mother's name? A. Violet Bailey.
Age, 21 years.

Q. Yes? A. Hairdresser of 167 Windward Road, Kingston.

30 Q. Who reported the birth? A. The birth was reported by I. Dundas.

In the
Supreme Court

No. 21

Wesley Roach
Examination
(Contd.)

Q. And recorded by?
A. J.N. Russell on the 1st of October,
1948.

Q. Yes Mr. Kerr, anything else?

MR. KERR: No M'lord. I beg to tender the
certificate.

HIS LORDSHIP: Any questions Mr. Kirlew?

MR. KIRLEW: No please M'lord.

HIS LORDSHIP: Certificate is tendered. Yes,
next witness.

10

No. 22

Violet Bailey
Examination.

No. 22

Violet Bailey

VIOLET BAILEY: SWORN: EXAMINED BY HIS LORDSHIP

Q. What is your full name? A. What sir?

Q. What is your full name? A. Violet Bailey.

Q. You know the accused person? A. Yes sir.

Q. What is he to you? A. Maloney Gordon, sir?

Q. Is he your son? A. Yes sir.

Q. Is he known by the name of Eustace
Washington Gordon?

A. Well, Your Honour, please is not me
register him please, sir.

20

Q. No, no, is he known by the name of Eustace
Washington Gordon?

A. I know him as Maloney Gordon, sir.

Q. What date was he born? A. Don't remember
the date of his birth, sir.

Q. You don't remember the date of his birth?
A. No sir, I don't quite remember the date
of his birth.

30

Q. You don't quite remember the date of his birth? A. No sir.

In the
Supreme Court

Q. How old is he? A. I don't remember the date that him born, sir.

No. 22

Q. Yes, but you know how old he is? You know or you don't know?
A. I say him is around seventeen, sir.

Violet Bailey
Examination.
(Contd.)

Q. You don't know how old he is?
A. No Your Honour, sir.

10 Q. Yes Mr. Kerr.

CROSS-EXAMINATION BY MR. KERR.

Cross-
examination.

Q. Lady, where was he born? A. What sir?

Q. Where was he born? A. Jubilee Hospital.

Q. Victoria Jubilee Hospital in Kingston?
A. Yes sir.

Q. You know who registered him? A. My aunt yes sir.

20 Q. What is her name?
A. Emiline Bernard; is she I ask was to register him, sir.

Q. I see. Where is she now? A. She is dead, sir.

Q. What name you told her to register him under?
A. I give her the name to register him as Maloney Gordon, sir, so I don't know if she did change the name, sir.

Q. Can you read? A. No sir.

Q. Have you got any other son? A. Yes sir.

30 Q. What is the name of that son?
A. I have one the name of Eustace; I have one the name of Clive; I have one the name of Barrington, sir.

Q. Eustace, Clive and Barrington? A. Yes sir.

In the
Supreme Court

No. 22

Violet Bailey
Cross-
examination
(Contd.)

Q. Eustace what? A. Gordon.

Q. Clive what? A. Gordon.

Q. Barrington? A. Gordon.

Q. How many sons in all you have?
A. I has four sons, sir.

Q. Four sons. Who is the oldest.
A. The one that name Eustace suppose to be
the oldest one.

Q. And what position does he come? A. What sir?

Q. What position he comes into the four? 10
A. Say what position he come into the four?

Q. Is he first, second, third or last?
A. No, he is not the first one, sir.

Q. You must know. A. He is the second one.

HIS LORDSHIP: Who is the second one, Maloney?
A. Yes sir.

HIS LORDSHIP: Mr. Kerr I think we will have
to get some more evidence.

MR. KERR: It looks like we are running up a
blank wall because she really has a son 20
named Eustace she says. (To witness)
Where is Eustace now?
A. I don't know where he is now.

HIS LORDSHIP: Where is he?
A. I don't know where he is now, he was
with his grandmother in the country, so
I don't know where he is, sir.

MR. KERR: Where you had Eustace?
A. Whole of them born at Jubilee, sir.

HIS LORDSHIP: You were in hospital when 30
Maloney was delivered? A. Yes sir.

Q. Who was the doctor? A. I don't know sir.

Q. The nurse? A. I don't know sir.

MR. KERR: M'lord we are faced with this position: she has four sons; she has one named Eustace, she says, which is the name on the certificate. (To witness) Is he Eustace? A. No sir.

Q. He isn't Eustace? A. Maloney.

Q. You have one named Eustace? A. Yes sir.

Q. Older than him? A. Yes sir.

10 HIS LORDSHIP: Eustace is older than Maloney?
A. Yes sir.

HIS LORDSHIP: So the question now is, Mr.Kerr, in connection with this certificate is it the accused person?

MR. KERR: It looks so M'lord. What the evidence has established is that there is a Eustace and that he is not Eustace. (To witness) How much older than this boy is Eustace?

20 A. Well, I have one Nineteen Forty something, sir, nineteen forty-seven or eight. I don't really remember. I think it is 1947.

Q. Which one is that? A. That is the first one, sir.

Q. And when you had the next one?
A. And I have the next one 1950.

Q. 1950? A. Yes Sir

HIS LORDSHIP: Yes Mr. Kirlew, is there anything....

30 MR. KIRLEW: No please, M'lord, I don't wish to ask any questions.

Q. With regard to the proper age, are you prepared to assist the court and to cause the accused person to give evidence?

A. I asked him previous to this trial but he was not able to give any information. While taking a statement I asked but he couldn't help me.

In the
Supreme Court

No. 22

Violet Bailey
Cross-
examination.
(Contd.)

In the
Supreme Court

No. 22

Violet Bailey
Cross-
examination.
(Contd.)

HIS LORDSHIP: Well, there is authority which says - "Where the age of any person at any time is material for the purposes of any provision of the law under the Juvenile Act, - paragraph 692 - or of any Order in Council made thereunder, regulating the powers of the court, his age at the material time shall be deemed to be or to have been that which appears to the court "after considering any available evidence to be or to have been his age at that time."

10

I have before me what appears to be a certified copy of the birth certificate in the name of Eustace Washington Gordon and according to the certificate the mother's name is mentioned as Violet Bailey and the age of that person is that in October last year he was 18 years old. (To Mr. Kerr) Is that so?

20

MR. KERR: In September last year, according to the certificate, Eustace Gordon was 18 years old - 1966.

HIS LORDSHIP: Last year?

MR. KERR: Yes M'lord.

HIS LORDSHIP: So then on the date of the 18th February, 1967 he was over eighteen years old. I have seen the accused person in the course of evidence in the witness-box. He has given evidence. I have had an opportunity of observing him and I find as a fact from all the circumstances that on the date of the 18th of February 1967, he was over eighteen years old.

30

Yes, call on him.

No. 23
Sentence

In the
Supreme Court
No. 23
Sentence
22nd November
1967.

REGISTRAR: Maloney Gordon, the jury having found you guilty of the charge of murder do you wish to say anything before the sentence of the court is passed on you? A. Yes sir.

HIS LORDSHIP: Yes.

10 ACCUSED: Them find me guilty of murder and I didn't do the firing but the jury prejudiced them mind against me, sir.

HIS LORDSHIP: Anything else?
A. That is all, sir.

P R O C L A M A T I O N .

HIS LORDSHIP: Maloney Gordon, the jury have found you guilty of the offence of murder. The sentence of this court is that you will suffer death in the manner authorised by law.

160.

In the Court
of Appeal

No. 24

Notice of Appeal and Grounds of Appeal

No. 24

JAMAICA

Notice of
Appeal.
5th December
1967.

CRIMINAL FORM 1

In the Court of Appeal

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO
APPEAL AGAINST CONVICTION OR SENTENCE.

Criminal Appeal No. 188 of 1967

To the Registrar of the Court of Appeal

Name of Appellant - Maloney Gordon

10

Convicted at the Circuit Court held at -
Home Circuit Court

Offence of which convicted - "Murder"

Sentence - "Death"

Date when convicted - 22nd November, 1967

Date when sentence passed - 22nd November 1967

Name of Prison - St. Catherine District Prison

I, the abovenamed Appellant hereby give
you notice that I desire to appeal to the
Court of Appeal against my Conviction on the
grounds hereinafter set forth on page 3 of
this notice

20

Signed x Maloney Gordon

Appellant

Signature and address of witness attesting
mark.....

Dated this 5th day of December, 1967.

QUESTIONS	ANSWERS	In the Court of Appeal
1. Did the Judge before whom you were tried grant you a Certificate that it was a fit case for Appeal?	NO	<u>No. 24</u> Notice of Appeal. 5th December 1967 (Contd.)
2. Do you desire the Court of Appeal to assign you legal aid?	YES	
10 If your answer to this question is "yes" then answer the following questions :-		
(a) What was your occupation and what wages, salary or income were you receiving before your conviction?	Apprentice Mechanic £2.10. per week	
(b) Have you any means to enable you to obtain legal aid for yourself?	NO	
20 3. Is any Solicitor now acting for you? If so, give his name and address:		
4. Do you desire to be present when the Court considers your appeal?	NO	
5. Do you desire to apply for leave to call any witnesses on your appeal?	NO	
30 If your answer to this question is "Yes" you must also fill in Form 22 and send it with this notice.		

In the
Court of Appeal

No. 24

Notice of
Appeal.
5th December
1967 (Contd.)

GROUND'S OF APPEAL OR APPLICATION

1. The verdict is unreasonable and cannot be supported having regard to the evidence.

(a) The witness Camille Chung, the only eyewitness on behalf of the Crown stated in evidence that she did not remember which one (of the five or six persons) had the gun what did the fatal shooting, and that she thought the appellant was the one who did the shooting.

(b) The said witness said it was a clear night at the hour when the shooting was done but the meteorological officers said it was a dark night.

10

2. Any reasonable jury must have had reasonable doubts as to guilt.

3. The learned trial judge did not direct the jury as to common design, and such a direction was necessary in the circumstances of this case.

Supplementary Grounds

20

1. The statements of the jury against me was Biased.

2. Conflicting statements by Crown evidence.

3. Unfair Trial.

4. Barrister will supply additional grounds.

Witness: A. Easy wd. c/o St. Cat. Dist. Prison.



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spot, while he resisted their efforts. In the meantime Chung made an attempt to get to the car, and eventually succeeded. The deceased Barton and the three men were then about two yards from the right side of the car.

Whilst in the car she heard the deceased tell the men to take everything that he had. She said that she saw one of the men with a gun, they were all three holding Barton and a struggle was going on. She could see clearly. 10
She heard the deceased say that he had a gun; the struggle continued and in the course of the struggle she heard a shot. The struggle continued for a while and then she heard another shot, and she saw Barton fall to the ground. She began to shout and her shouting attracted a passing car. The car stopped and the men ran off leaving Barton lying on the ground.

The police later arrived on the scene. Later a post-mortem examination was carried out by Dr. John Martin on the body of the deceased which revealed on dissection a bullet wound entering the chest between the 5th and 6th ribs going upwards and piercing the covering of the heart, entering the left ventricle and filling the pericardium and the left chest with blood. he also found another bullet wound going through the hip bone and sacrum, and the bullet was found lodged under the skin. In the Doctor's opinion 30
the cause of death was damage to the heart by the bullet wound and massive haemorrhage into the chest.

The applicant was subsequently taken into custody and placed on an Identification Parade which was held on the 28th April, 1967, at the Central Police Station where Camille Chung picked out the applicant from a line of men as the man who had shot Barton.

Her evidence at the trial on this aspect of the case was as follows: "On the 28th April 1967, I attended a Parade and pointed out one as the one who shot the deceased. I see him here today, the taller one (and she pointed to the accused Gordon). I didn't know any of them before. I think he was the one who had the gun." She further testified at the trial 40

that the applicant was one of the three persons holding the deceased, and that the gun never at any time changed hands.

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Inspector of Police Winston Facey who conducted the Identification Parade on the 28th April, 1967, gave the following account as to the actual identification of the applicant by Camille Chung. After stating that Mr. Haughton Gayle, barrister, attended the parade at the request of the applicant, he
10 went on to say: "The witness Camille Chung was summoned and she came. I asked the witness Chung if she knew what was the purpose of the parade, she said to point out the man who shot Andrew Barton on the 19th February, 1967, along the Palisadoes Road. I told her to walk along the line and if she saw him she should touch him. She walked along the line and touched the accused, Gordon, and said
20 "this is the one who had the gun".

The applicant gave evidence on his own behalf and his testimony was to the following effect :-

"On the 18th of February, 1967, some time at night, I was at Glasspole Avenue. Howard Simmonds came along driving a car. He stopped spoke to me, he said: 'Come let us go for a drive'. I agreed to go. There was no one else in the car. I know Simmonds before for
30 a long time. We used to go to school together. The two of us have the same height, same complexion. About one or one and a half chains we see five more fellows, him stop, them talk about going for a drive and if they were coming, they said yes. Howard Simmonds drove the car. There were seven of us, Dennis Barth, Garth Williams, Edward Thompson, me, Howard, Taylor and Maurice. He drove to the airport round-
40 about and turned back. We saw a little red car parked over the big sea side of the road. Howard drove to the bottom side of the car and stopped. He said 'mek we go for some money from the people in that car'. Everybody talk, not that them come for is only for a drive. He said if anybody not coming they have to walk back

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home. We came, all of us, all seven, we start to go with him. The red car park with front to the road side and back to the sea. We didn't see anyone there. Howard and Maurice walked down to the sea. Then say 'see two people here'. We all go down to where the two people were. Dennis and Junior take away the girl, the other five of us was talking to the man. Nothing never take place. Well, two of us leave like from where I am to the table in court. I don't know what happened between the three of them and the man but a wrestling started between them and the man. I turned back, and I saw Howard and the man close up together. I take away the man from Howard. I heard Howard say 'you lucky I didn't shoot you'. I took away the man from the distance from about the box to the first bench in court. He was standing there alone, he said to me 'the money that your friend want down there on the beach' where the two of them were sitting down. Me and Garth go down by the beach to see if we can find the wallet, we did not see anything at all. When we coming up back I said to Dennis and Junior to let go the girl and come. We started to walk towards the car. I did not have to pass anyone when I was walking towards the car with Garth - the car from which we went in - I heard a shot. We looked back and we run towards Howie. My intention was to stop him from firing another shot. Before I reached him I heard another shot and the man dropped. We all run away and go to the car. 10 20 30

I did not know Howie had a gun. I did not know even when we came out of the car that Howie had a gun. I first knew when he said 'lucky I never shoot you'. We did not search the man. The whole of us say he shouldn't do it, and if the police ask, we going talk, and Howie say if anything happen like that he going to shoot somebody. 40

According to the applicant's story, therefore, he was present when Barton was shot, but that he did not shoot anyone and Howard Simmonds, whom he knew had died several weeks before his

arrest, was the man responsible for the shooting of the deceased, and in fact he, the applicant, had done everything to protect Barton from being shot after he knew that Simmonds had a gun.

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10 Learned counsel for the applicant argued before us one main ground of appeal that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence, particularly in view of the fact that Camille Chung, the only eyewitness on behalf of the Crown stated in evidence that she did not remember which one of some five or six persons had the gun which did the fatal shooting and that she thought the applicant was the one who did the shooting. He urged that even if the jury believed the witness Chung implicitly they could not come to any other conclusion than that she was not sure
20 who had in fact shot Barton.

The learned trial judge in the course of his summing-up dealt with the all important question of identity when reviewing the evidence of Camille Chung in this manner. He stated -

30 "I am not telling you how to regard the evidence or how not to regard the evidence in this case, and it is my duty on certain aspects of the facts to draw your attention to some that you can consider salient features of the facts, but now I must tell you that if you have any doubts as to whether or not the witness is speaking the truth, well then, you will have to acquit the accused person but remember that the onus is on the prosecution to satisfy you of the guilt of the accused beyond a reasonable doubt
40 before you can return a verdict of guilty against him."

In another passage at p.131 of the summing-up, the learned trial judge said -

"Are you satisfied beyond reasonable doubt that he died from the bullet wound? You may well be satisfied that is so, but the question as to who did it is another

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matter, having regard to the evidence before you."

The significance of the question of identity was therefore clearly outlined to the jury by the learned trial judge.

This court has given anxious and careful consideration to the evidence in the case as well as to the submissions made to it. It is idle to pretend that the case does not present points of difficulty, particularly in view of some of the confusing and conflicting answers of the witness Chung on the question of identity. Despite these, however, there is the undoubted fact that the witness, Chung, at an Identification Parade, the fairness of which could not be justifiably challenged, identified the applicant as the man who had shot Barton. In addition to that there was her evidence to the effect that the gun never at any time changed hands, and the applicant had further more placed himself at the spot where the shooting took place.

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The attitude which the court should adopt when confronted with a problem such as was posed in this case is summarised from the authorities in Ross on the Court of Criminal Appeal at p. 89 :-

"The verdict must be so against the weight of the evidence as to be unreasonable or insupportable. Nor where there is evidence to go to the jury is it enough in itself that the judges after reading the evidence and hearing arguments upon it consider the case for the prosecution.....not a strong one; or that the evidence as a whole presents some points of difficulty; or that the members of the court feel some doubt whether had they constituted the jury, they would have returned the same verdict or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act nor is it within the functions of a court composed as the

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Court of Appeal is that such cases should practically be retried before the Court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury."

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We are unable to say that the verdict of the jury was obviously and palpably wrong.

The application must accordingly be refused.

10

C.G. HENRIQUES P.

A. SHELLEY J.A.

J.D. ECCLESTON J.A.

No. 26

Order granting Special Leave to Appeal in forma pauperis

In the Privy Council
No. 26

Order granting Special Leave to Appeal in forma pauperis
23rd May 1969.

AT THE COURT AT HOLYROODHOUSE

The 23rd day of May 1969

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

20 Lord Wilson of Langside
Mr. Secretary Ross

Lord Stott
Mr. Thomson

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of May 1969 in the words following, viz:-

30

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Maloney Gordon in the matter of an Appeal from the Court of Appeal of Jamaica between the Petitioner and Your Majesty Respondent setting forth that the Petitioner desires to obtain special leave to appeal in forma pauperis to

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Privy Council

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Your Majesty in Council from the Judgment and Order of the Court of Appeal of Jamaica dated the 1st May 1968 dismissing the Petitioner's Application for leave to appeal against his conviction by the Home Circuit Court held at Kingston on the 22nd November 1967 upon a charge of murder: that the principal ground of the said Petition was that the Petitioner was sentenced to death by the said Home Circuit Court without it having been ascertained in a proper manner that the Petitioner had attained the age of eighteen years: and whereas a humble supplemental Petition of the said Petitioner in the same matter set forth further grounds relating to the evidence of identification given before the said Home Circuit Court: And humbly praying Your Majesty in Council to grant him special leave to appeal in forma pauperis against the Judgment of the Court of Appeal of Jamaica dated the 1st May 1968 or for further or other relief:

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"The Lords of the Committee in obedience to His late Majesty's said Order in Council have taken the humble Petition and supplemental Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Order of the Court of Appeal of Jamaica dated the 1st May 1968 on the ground set forth in the aforesaid Petition:

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"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

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HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and

carried into execution.

Where of the Governor-General or Officer administering the Government of Jamaica for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

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Privy Council

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to Appeal in
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23rd May 1969
(Contd.)

Exhibit 5

Statement of Maloney Gordon.

Exhibits

Exhibit 5

10 Do you wish to say anything? You are not obliged 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) Maloney Gordon

29.4.67

Aston Hamilton J.P. Kingston.

Statement of
Maloney
Gordon
29th April
1967

20 I Maloney Gordon 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 that whatever I say may be given in evidence.

(Sgd) Maloney Gordon

29.4.67.

Aston Hamilton J.P. Kingston.

Maloney Gordon states:

30 On a Saturday night in February 1967 I now remember that it was the 18th of February 1967 at about 11.30 p.m. I see Howard Simmonds driving a car on Glaspole Avenue. He stopped the car and asked me to go with him for a joy ride. When I go into the car I see Garth,

Exhibits

Exhibit 5

—
Statement of
Maloney Gordon
29th April 1967
(Contd.)

Little Junior and Copper in the car. Howard drive the car with all of us down the Palisadoes Road. We made several trips between Gypsum Wharf and Palisadoes Round-about. While we was making one of the trips we see a little red M.G. Car parked in a little track to the deep-sea side of the Palisadoes Road, near to a Old Ship. Howard said to us "Come let we go look a money from the car people. Everybody in the car said 'No Man is a joy ride we come bout. Howard said "Alright since nobody no want go look any money and me broke unoo have to walk go back". We all decided to go with Howard to the car to get the money. Howard parked the car little below where the M.G. car was. After Howard park the car all a we come out and walk up to the M.G. car. We never see anybody in the car. We walk up and down and then we see a man and girl on the beach. The man was wearing white short trousers. Howard take out his gun and stick up the man and tell him don't move. Him and the man start fe wrestle. I (hold) hold the man and take him away from Howard. Little Junior and Copper hang-on pon the woman and take away her ring. We search the man and the man watch burst off him hand and drop somewhere on the sand. While me hold the man Howard said to the man "You lucky me never shoot you". The man never answer him. We never find any money on the man. I tell Little Junior and Copper to let go the woman and come. I start to walk away with Garth.

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When I was walking away I hear one gun shot fire. Me and Garth turned back and run toward Howard. Before we reach Howard I see Howard fire a shot at the man and him drop same place. Everybody get jumpie and me asked Howard why him do that. We see a car drive up and everybody run towards our car and we drive off to Kingston. We start to curse Howard and him tell us fe keep we rass mouth quiet if not we will get kill to. Me come out of the car near Deoch Road with Garth Copper and Little Junior. Howard drive away the car. Every one of us say that if the Police hold them, them going to talk that is Howard do the shooting. Me have no more to say.

40

173.

The above statement was read over to me. I have been told that I can correct alter or add anything I wish. This statement is true. I have made it of my own free will.

(Sgd) Maloney Gordon

29.4.67.

Aston Hamilton J.P. Kingston.

Exhibits

Exhibit 5

Statement of
Maloney Gordon
29th April 1967
(Contd.)

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Taken by me at the request of the defendant on the 29.4.67. at the Flying Squad Office between 9 a.m. and 9.30 a.m. It was read over to him by me at his request and he signed it as correct.

(Sgd) Reuben Robertson D.I.

29.4.67.

IN THE PRIVY COUNCIL

No. 15 of 1969

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

MALONEY GORDON

Appellant

- and -

THE QUEEN

Respondent

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