BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 15, 16 and 17 of 1999

BETWEEN:

ORLANDO MACDONALD DACOSTA LORDE

ROBIN DWAYNE HOWELL

PETER O'NEAL FORDE

(Appellants)

AND

THE QUEEN

(Respondent)

Before: The Hon. Mr. Justice Errol DaC. Chase, The Hon. Mr. Justice Colin A. Williams and The Hon. Mr. Justice Frederick L.A. Waterman, Justices of Appeal.

2001: 15, 16 and 22 March

2002: July 31

Mr. A. Pilgrim for Appellant Lorde

Mr. R. Thorne for Appellant Howell

Mr. R. Worrell for Appellant Forde

Mr. D. Saddler in association with Mr. T. Gibbs for the Respondent

DECISION

[1] WATERMAN J. A. On June 16, 1999 the three appellants were convicted of the offences of rape and robbery. On June 17, they were each sentenced to 30 years imprisonment for rape and 15 years for robbery. The sentences in each case were made to run concurrently.

[2] On June 1, 1999 at the beginning of their trial the appellants were arraigned with a fourth person who on June 4 did not appear to answer his charges.[1] The jury were subsequently discharged from returning a verdict in respect of that person.

[3] The charges arose out of an incident that the Crown alleged took place in French Village in St. Peter in the early hours of the morning of July 14, 1995. It was the case of the prosecution that about 11: 00 p.m. on the night of July 13, 1995, the three appellants went to the Lower Green Bus Stand in Bridgetown and together boarded the mini-bus B 192 and remained on that minibus throughout its journey until it reached its final destination in French Village in St. Peter where they raped and robbed the conductress of the bus. The main witnesses for the prosecution were Alistair Piggott and the virtual complainant.

[4] Piggott testified that he was the driver of the minibus B 192 which left Bridgetown enroute to French Village in St. Peter about 11 o'clock on the night of July 13 with the virtual complainant as the conductress.

[5] His further evidence is that two bus stops before the bus got to French Village a passenger got off. A stop further up another passenger whom he thought would have been the last passenger got off. Then he heard the conductress say, how far are you going? Before he could look around someone stepped behind him, put something to the back of his head and told him to drive the bus around the corner. He complied. The man then said, park in that gap there, turn off the lights and to give them the counter. The counter, Piggott said, is an instrument used to tally passengers as they board the bus. One of the men then told him to get from behind the driver's seat. Immediately thereafter one of the men told him and the complainant to go to the back of the bus and take off their clothes. He went to the second last seat in the back of the bus and took off his pants but not his shirt and the complainant went to the rear and took off her clothes. There were two other [2] men sitting in the back. They stayed there

for about ten minutes, then one of the men said, let us get from down here, we have to get to Christ Church or something like that. One of them wanted to drive the bus but Piggott evidence is that he told him that if he did not have a licence he could not drive and that he Piggott would have to drive. He then drove the bus in the direction in which he had come from, on to Farley Hill, down to Greenland, on to Belleplaine. Before he got to Belleplaine one of the men told him that he wanted to drive now. Piggott said that he drove the bus over the bridge, stopped by some casuarina trees, got out of the driver's seat and allowed the man to drive. Before they got to the Belleplaine Police Station he touched an emergency button at the corner of the door and the door opened. He got off the bus, ran to the police station and reported the matter.

[6] Sometime after he went to Holetown Police Station where he identified the appellants Lorde and Forde as two of the man who were on the minibus on the night of the incident when the bus reached its destination at French Village. He said that while on the bus Forde was sitting in the front seat behind the driver or was standing in the door. Piggott's further evidence is that while cleaning the bus some days after he found two bangles which he handed to the police.

[7] The complainant testified that in 1995, she was employed as a conductress on the mini-bus B 192 and her employer was P.R.C. Walker and Company Limited. The mini-bus plied the route from Bridgetown to Indian Ground in St. Peter.

[8] On July 13, 1995 she went to work about 2.30 in the afternoon. Alistair Piggott was the driver of the bus. They left the Lower Green bus stand in Bridgetown at 11:00 p.m. for their last journey for the night to Indian Ground. Before she started to work that afternoon she collected her money- [3] bag and a float of $50. She was wearing a yellow and blue shirt, black skirt, black panties and black brassieres. She had on two gold charms, a pair of gold plated earrings, a pair of bangles, a slave band and a ring. In her purse she had $50 Barbados currency.

[9] Her further evidence is that after they set out from Bridgetown that night the bus picked up passengers along the route. After leaving Indian Ground they continued to French Village. At French Village the same passenger that got on the bus at Royal Pavilion got off in French Village. He is usually their last passenger. When he got off she glanced back in the bus and there were still four passengers on the bus. At that time she was opposite the driver in the front of the bus. She asked the passengers where they were going and one of them said, the gap on the left. She told them that there was no gap on the left and they said, all right, go up the hill. The driver drove up the hill, stopped the bus and opened the door. When the door opened the men rushed towards them told them to turn off the engine and the lights and proceeded to snatch the money bag and her jewellery from her. They told the driver and herself to go in the back seat and take off all their clothes. She took off her shirt and while she was taking off her top she felt someone drag it off and he said, you aren't done yet, and he dragged her shirt off her. The same four passengers, the driver and herself were the only persons on the bus at that time. One of the men told her to lie down and he placed one of her feet on the back of the windshield and the other over the bus seat and then he forced his penis into her vagina. He started to have sex with her. While he was doing so another man came and put his penis in her mouth. She was trying to look into the face of the man who was having sex with her and he told her not to do so but she still tried to look into his face. This lasted for [4] about five to ten minutes. Her evidence is that she did not give any one permission to have sexual intercourse with her that morning.

[10] After the first man finished having sexual intercourse with her he got up and the one that had put his penis in her mouth started to have sex with her. When that man was through he pulled out his penis and ejaculated on her stomach. She was in the back seat crying and did not know what was going on in the front of the bus. She was lying down and just heard voices. She did not understand what was being said. Then the third man came in the back seat. She told him that she wanted to go home to her children. He slapped her in her face and asked her if she was vexed that the others had sex with her and told her that he wanted some too. He unzipped his pants and started to have sex with her. Suddenly he stopped, took out something like a knife and put it to her throat. He told her that she wasn't making him feel good and that she should put her hands around him which she did. He had sex with her for about ten minutes with the knife at her throat throughout. He then took his penis out of her vagina and put it inside her mouth where he ejaculated. She spat the semen in the bus.

[11] She testified that she then realised that the bus was in motion but did not know where it was because she was in the back seat lying down. All she could see around her were trees, the sky and the top of the seats. She held up her head to see where she was and realized that the bus was going down Farley Hill. As the bus was going down the hill another man came to her. This man was not one of the three men who previously had sex with her. This fourth man came and told her that he wanted to have sex with her. He told her to stoop down in the aisle. He had sex with her for about two minutes and stopped. She heard an argument in the front of the bus. People seemed to her to be quarreling and the driver was sent to the back. He sat in [5] the seat in front of her. Someone started to drive. The bus continued going down to the junction by Belleplaine and Shorey Village. Whilst the bus was going towards Belleplaine she realized that Piggott had gone back to the front of the bus. She then heard a voice shouting, there's a police station, there's a police station there. She heard the sound of feet baling off the bus and when she looked up she didn't see anybody in the bus. The bus was still in motion and eventually it ran into a ditch. She then saw the passengers from the bus running across the road. She got up, took up her skirt, put it on and ran out of the bus. She ran back down the road because she realized there was a police station there. She ran to the station with just her skirt on. When she got there she saw Piggott standing outside the station. As she did not have on any top Piggott threw his shirt over her. She then went into the station where she spoke to the police. A female officer then took her to Dr. Bannister who examined her. She was later taken to her home where she handed over to the police the clothes she was wearing that morning. Sometime later she went to the Holetown Police Station where she identified her conductor's money bag, her jewellery and her clothes. She also identified the appellant Howell as one of the four men who had ravished and robbed her. Her evidence is that the men on the bus wore shirts that had hoods. The hoods were on their heads.

[12] Police officers testified that the appellants all made statements to them. The learned judge (at pp 466 and 467 of the record) told the jury that the prosecution's case was that the appellants committed the offences together and went on to give them the following directions:

"Where a criminal offence is committed by two or more persons, each of them may play a different part but if they are acting together as part of a joint plan or agreement to commit it, they are each guilty. [6]

It is the law that where two or more persons form a plan to commit a crime, and proceed to put the agreed plan into execution, those who are party to the plan and who participate in the execution of the agreed plan become responsible for the acts of each other done in the course or furtherance of the plan.

The words plan and agreement do not mean that there has to be any formality about it. They don't have to have sit down and drawn up a plan and say this is what we're going to do. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink or a knowing look or it can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each defendant shared a common intention to commit the offence and played his part in it, however great or small so as to achieve that aim. Your approach to the case therefore should be as follows: If, looking at the case of any accused, you are sure that he did an act or acts as part of a joint plan to commit the offences, he is guilty. Put simply, Mr. Foreman and members of the jury, the question for you is this: Were they in it together?"

[13] He continued (at p. 513 of the record):

"Now, Mr. Foreman and members of the Jury, what is the case for the Crown? The case for the Crown is that Robin Dwayne Howell, Orlando MacDonald Lorde, and Peter O'Neale Forde went to the Lower Green bus stand in Bridgetown sometime around 11 p.m. on the 15th -- on the 13th of July, 1995 and boarded the minibus B 192 in order to execute their plan to ravish and rob the virtual complainant and that they remained on that minibus throughout its journey to its final destination and bided their time until the last passenger, Ambrose White, disembarked at French Village and there and then they executed their plan."

[14] Later, he said (p. 515 of the record):

"The case for the Crown is therefore that the three men, the three accused men were parties to a plan to ravish and rob the virtual complainant, and that they proceeded to put the plan into operation and that they each shared a common intention to commit the offences of rape and robbery and that each one of them played his part in the commission of those offences so as to achieve that aim and that each one of them is guilty of rape and each one of them is guilty of robbery"

[15] He then told the jury that the three appellants had denied participation in what occurred at French Village in St. Peter that morning and that they denied the allegations against them and had pleaded not guilty. [7]

[16] After a review of the evidence he dealt with the cases of each of the three appellants.

The case against Lorde and his defence

[17] The learned judge told the jury that the case against Lorde was that he was party with others to rape and rob the virtual complainant. It rested, he said, (1) on the evidence of the complainant who said that she was ravished and robbed by the three passengers who remained on the bus after it reached its final destination at French Village in St. Peter, (2) on the evidence of Alistair Piggott, Wayne Worrell and Ambrose White who identified Lorde as one of the three passengers on the bus that night, (3) on the oral statements allegedly made by Lorde and (4) on a written statement allegedly made by him.

[18] The learned judge gave directions on the Turnbull case (p. 473) and reminded the jury of the circumstances in which the witnesses identified Lorde. He also gave directions on the matter of identification parades (p. 476) and he reminded the jury of the oral statements allegedly made by Lorde:

"When Robin and Wayne get hold I tell my family that I was with them and I gine give myself up but my father tell me to hide out at Gussy Pa 'til he get money for a lawyer."

[19] Later, when the police invited him to show them the various places where the bus had travelled:

"Man, I can't find back dem places now."

[20] Later, " I ent want no parade, I done it already";

[21] And then the following written statement which Lorde gave police officers (the record disclosed that following an objection by Counsel the statement was admitted into evidence (p. 230)): [8]

"The Thursday night that this thing happen I was up town in the Z.R. Stand in Independence square cooling out. Wayne, Peter and Robin came up there, we did talking and them tell me that them want money.

I think that it is Wayne that tell we let we go and tek a van and everybody did in for it so he say that if 192 down dey we gine tek it cause he want to fuck de girl that does work pun it. We walk down Broad Street and went down by Courts where de vans does park pun a night. No vans was there so we cool out and B 21 came in first and then 192 come soon after. When it get a certain way full we get in, I sit down pun de same side as the driver and the rest went in de back of the bus. The bus passed down Black Rock and went straight down Speightstown and then went up a hill I ain't know down dey but I see a sign mark Indian Ground and then de bus went round a corner down a hill and then up another hill. The last man get off and left de four of we pun de bus, de girl asked we which part we gine and Wayne say next gap pun de left. De driver get by a cart road and stop and Wayne tell he alright turn off de light and turn through de gap. All we pull out we knives and Wayne had a plastic gun wid a piece of black cloth throw over it. All we went front by de driver and Robin tek way de girl jewellery and give me a chain; Wayne tek way de bag and hand me and hold de girl and carry she down to the back of de bus and Peter mek de driver go down to the back of the bus. Wayne mek them tek off the cloths and Peter went and start de bus but Wayne tell he don't move yet and Wayne screw she first, before Wayne done Peter reverse de van and move off, but he couldn't really get it handle and the driver tek back over de bus; when Wayne done foop, Robin foop second and I did up front watching de driver and I had the plastic gun; when Robin done he come up front to watch the driver and I went down in the back of the bus and see Peter screwing de girl. When he done I turn she round and start to screw she from behind but I really ain't do it too long cause I did frighten and I did feel fuh she. Cause she did trembling all de time. Peter and Wayne start to mek noise that them want to drive and the driver give Wayne the bus. Wayne stop by a road and asked the driver if to go left or straight and he tell Wayne straight. Wayne went straight

and then de driver jump out and run in a police station near which part Wayne did stop. Wayne start to drive faster and run off de road and we jump out and run. I went up a long hill and I see a taxi park in front of a house and I knock pun de house and nobody ain't answer, I walk from there and I end up in a dead end and hide out. I went back by the same house and knock again but nobody ain't answer. A man from another house come and asked me what I want and I tell he that I want a taxi to get to Christ Church and he say that de car ain't move for months to go long before he call de police and I left and I just walk and I end up in Jackmans cause I know down Jackmans side. I get a bus from up there and I went in town. I see Peter in town and he tell me that Robin and Wayne now gone down de road that them walk [9] cross the East Coast Road and catch a bus to town. Peter give me sixty dollars and he went home by me. I did feel bad and I tell my mother what I do. I stand home the Saturday and Peter came by me the Sunday and tell me that he got a girl to go by and he want to sport de chain and I give he it. My father then tell me he gine carry me by Gussy Pa in de Pine and hide me till he get money to get a lawyer."

[22] The Jury were also reminded of Lorde's unsworn statement from the dock (p. 446):

"Sir, my name is Orlando Lorde. I'm a general worker at NCC, National Conservation Committee. Sir, I did not plan to rape or rob anybody, sir. Sir, on the night -- let me see, on the morning when the police came for me at a friend of my family where I was staying, sir, the police officer to whom I knew and went to school with me arrested me. His name was Paul Lynch. He came to the residence, told Mr. Lionel that they were inquiring about a rape and robbery scene in a minibus. They arrested me, took me to Oistins Police Station. From there they got some more officers and took me to Peter Forde's residence. They surrounded the house and I was left inside of the van with three other officers whom I do not know. They started to beat me there, your honour, and they did not find Peter Forde at his home so after the licks got a little bit too hot I took them to another residence, a fella by the name of George, that's all I know him as, because they wanted to know who Peter Forde does lime by. After that they took me to Central Police Station. From there they took me to Holetown, Holetown police station, sir. When I arrived there they took me to a room on the right hand side of the building that contained a photocopying machine. There was another officer in there who addressed me saying I come in there without saying good morning to him. So he slapped me 'longside my head. After that, your honour, I was placed to sit down at the right side of the desk. And while I was there I think the name was Sergeant Reid? Sergeant Reid came in with a statement, told me he already got it from Robin and Wayne and that if I don't sign this he going beat me some more. So I refused to sign it. So after they started beat me they stop, brought in a person whom I knew as Pearson The virtual complainant through the case. I identified him as a vendor 'longside Julie'N's bridge 'cause that's who I thought he was and then they brought in a police officer whom they told me was the girl's boyfriend. Afterward they took out those two persons and came back. And then they took up two wires, two wires, sir, and tell me that if I do not sign these they gine do to me exactly what they do to Wayne and Robin so I sign, your honour, but I did not plan to rape or rob anybody, your honour. That's all I have to say" [10]

[23] So that, the learned judge told the jury that the defence being put by Lorde was that he knew nothing about any plan to rob or ravish the virtual complainant.

The case against Howell and his defence

[24] The learned judge told the jury that the case against Howell was that he was party with others in a plan to rape and rob the virtual complainant. It rested, he said, on the evidence of the complainant who identified Howell at Holetown Police Station as one of the men who ravished and robbed her on July 14, 1995, on oral statements which the police said Howell made to them in the course of their investigations:

"All my family turn dem back on me when I did want help. That is how I get in this. It did me, Wayne, Peter and Lorde that do that. Lorde ain't screw she though. I got $60 from it and I buy food with it."

"I am man enough to do it so I could be man enough to tell you what I do. I mind the rest and get myself in trouble".

[25] And on Howell's written statement which appears at p 370(a) of the record in these terms:

"Thursday night that just gone I went to town wid Wayne and we did walking bout chilling out. We went to the van stand in Independence Square and I did asking people fuh money to get something to eat cause I in eat nothing that day. Wayne then asked me if I wanted money and I tell he "yes". We then see Peter and he and Wayne start to talk I en know exactly what them did talking about, but I get an idea when I walk up to them, cause I hear them talking about robbing a van, and if they should rob it in the van stand or somewhere else. I then hear Peter saying that we should get a fourth person. We get Lorde to come wid we. We then walk down to the Lower Green bus stand and we did deciding which van to take out of B21 and B192. We see 192 come in and we decide that it was going to be that. Peter tell me that me and Wayne gine hold the conductress and he and Lorde gine deal wid the driver. We catch the van and went wid it till everybody get out somewhere pass Speightstown. Wayne then say "let me get out hey" and start walking to the door. He then went to the driver and tell he to cut off the lights. I then went to the driver and he say that he gine cooperate. Lorde come to me and Wayne went down by the girl in the back. I hear she like she gine scream and [11] somebody hit she and tell she to shut up. I then tell the driver to go down in the back and Wayne tell he and the girl to tek off them clothes and I tell them to strip. The man tek off he clothes but the woman refused so Wayne went to she and slap she in she face. Lorde was in the front and Peter was behind the wheel. The man and the woman did naked and Wayne went to the woman and tell she that he want some of the pussy. She refused to open she legs and he fight she fuh the pussy. When he did finish I start to screw she. I discharge pun she belly. When we did dun Peter did trying to get the van start but he couldn't get it start. Somebody bring the driver to the front and he start the bus and drive it off. Wayne and Peter din in the back that time wid the girl. Lorde did by the door wid the money bag and I did by the driver making sure that he cooperates. I had my two fingers poking the driver in he side to make he feel that I had a gun. Somewhere between when the driver drove off the bus and Farley Hill, Peter started to drive the bus. The driver drove the bus down Farley Hill and he started to complain saying that the seat was itching him and that he wanted to put on his underwear. Wayne took over the bus and the driver put on his underwear. When we reach a junction wid a round about like, Wayne asked what direction to go and I tell he to go left but the driver tell he to go right and he went right. When the van was passing the Police Station in Belleplaine the man jump out of the bus and run in the Police Station. Every body then jump out of the bus and we run. The bus eventually run off the road. We walk cross the East Coast Road and we catch the first bus that did gine town. I get sixty dollars and I spend it in food. It is the company that I keep that got me in this, but still I got to say that it come through my family. Everybody turn them back pun me when I did want help."

[26] The learned judge went on to remind the jury of Howell's unsworn statement from the dock (p 445):

"First of all my name is Robin Howell. First of all I would like to say I did not rape or rob anyone. On the night -- not on the night, on the morning in question that officers came to my residence, they were -- it was four officers who came. They came to my -- came in my bedroom and stood over me and told me that they were police officers in plain clothes investigating a matter of a rape and robbery which occurred in St. Peter. They told my father that and told me also that they would like me to come down to the station for questioning. My father told me to go ahead so I went. When I got to the police van they handcuffed me and they -- I sat between Cumberbatch, S/Sgt. Cumberbatch and Constable Brome at the time. The first place they took me -- first they was driving, they asked me some questions about the other accused and they took me -- first place they took me was in St. Andrew. While driving along to St. Andrew they were questioning me and they were beating me [12] all in my side and give me a couple of slaps around my head and whatnot and telling me I know what was going on and I know about the case and whatnot. Second place they took me -- they beat me up so badly that I told them I knew an accused by the name of Wayne Springer, my friend name Wayne Springer. So they took me to Holder's Hill and on arrival there went in search of Wayne Springer but they didn't find him. And drive about for couple of more hours constantly beating me and beating me and beating me until they gave up and just took me to the station. And from there shortly after I saw Wayne Springer, he came to the station and they brought a statement to me and told me to sign it or they gine beat me some more so I didn't want any more licks so I sign it. That's all I have to say, sir."

[27] The learned judge also gave directions on the Turnbull case (pp. 474 and 475) and reminded the jury of the circumstances in which the complainant identified Howell. He also gave directions on the matter of identification parades (p 476).

[28] So in effect, the learned judge told the jury, Howell was saying that he knew nothing about any plan to ravish or rob the virtual complainant.

The Case against Forde and his Defence

[29] The learned Judge told the jury that the case against Forde was that he was party to a plan with others to rape and rob the virtual complainant. It rested, he told them (1) on the evidence of the complainant that she was ravished and robbed by the three men who remained on the bus after it reached its final destination in French Village in St. Peter (2) on the evidence of Alistair Piggott who identified Forde as one of the three men on the bus (3) on the evidence of Michael Bailey to whom Forde allegedly lent a chain and pendant which were identified by the complainant as her property which she had with her on July 14, 1995 when she was ravished and robbed (4) the oral statement allegedly made by Forde in the presence of police officers "that is the chain I gi he" and the written statement given by Forde to the police officers. [13]

[30] The learned judge gave directions on the Turnbull case, and reminded the jury of the circumstances in which Piggott identified Forde. He also gave directions on the matter of identification parades.

[31] The jury were reminded of Forde's written statement (p 201(a)):

"I reside at Rollins Road, Christ Church with my mother Vanessa Forde and my brother David Forde. I am a conductor on a ZR van. I'm employed by Mr. Tonio Weekes of Rollins Road, Christ Church. I have been a ZR conductor for about two and a half years. I am 18 years old. I attended Ellerslie Secondary School. I left school at the age of 15 years. I started work in August 1992. I know Robin, Wayne and Orlando Lorde. Orlando Lorde lives at Cane Vale New Road, Christ Church. I do not know the surnames of Robin or Wayne. I have known Robin and Wayne for about two and a half years. They are ZR van conductors. I knew them because we are employed by the same employer. We are working colleagues. I would not describe them as friends. I have never been out with them. Orlando Lorde is my friend. We have known each other for about six years. We would go to the beach often -- We visited each other. Orlando is a ZR van conductor as well. I worked full-time until the end of June 1995. I became fed up being a ZR van conductor so I decided to work weekends only from the 1st July 1995. On Thursday 13th July 1995 I left home about 4.30 p.m. I decided to go to Carrington's Village, St. Michael to visit an old school friend Everton Herbert. I left his home at about 8.30 p.m. We played dominoes in front of his home for 1 and a half to 2 hours. I waited about 10 minutes for a van to Independence Square. No van came so I walked to Independence Square. I arrived there at about 9.05 p.m. where I met Orlando. We had a casual conversation. I bought 2 beers from a hot dog cart and gave Orlando one of them. While we were drinking them Robin and Wayne came up to us. They asked us where we were going and what we were doing. We told them 'nothing'. Wayne told Robin that if he wanted to he could let us come because the car still has room. Wayne said they were going to Speightstown for a car. I decided to go because it was boring at home. That is why I left home in the first place. The 4 of us walked to the Lower Green Bus stand and took minibus B 192. I did not know the conductor or the driver. I paid my own busfare. Orlando paid his own fare as well. When the bus left the Lower Green terminal all the seats were taken and there were about 3 standing passengers. I was seated on the left in the 4th seat from the front. Orlando was on the left in the seat before the back seat. Wayne was in a seat directly behind the driver and Robin was in a seat behind him. I did not speak to any of them during the journey to beyond Speightstown. I did not know the area beyond Speightstown. When the bus got to Speightstown terminal there were 4 [14] standing passengers. The minibus took a right turn and stopped. About 7 adults and 10 - 11 children boarded. The bus continued, taking up and setting down passengers. The bus got emptier and emptier. The 4 of us remained in our positions. There came a time when there were only 4 of us as passengers. The conductor was female. At that time she was in the first seat next to the driver. They had a conversation but I could not hear what they were saying. I saw Robin lean forward and told Wayne something but I could not hear. The bus was still travelling. Wayne and Robin got up. Wayne told the driver to stop. Wayne pulled a gun. It looked like he took it from under his shirt. He told the driver to switch off the bus and turn off the lights. When he said this I started walking to the front of the bus to tell them to let me get out. The door was closed. While I was going forward Wayne and Robin were sending the driver and conductress to the back of the bus. Both of them were telling the driver and conductor to go to the back and take off their clothes and don't keep no noise because they don't want to have to kill anyone. I asked Wayne what he was doing. He did not reply. He pointed the gun at me and told me that I am the one who got to drive the minibus from up here. He said that is why he brought me along. He ordered me to drive. I got into the driver's seat as ordered. For a while he was watching me with the gun in his hand. I was shocked, scared, angry, everything in one. I started the engine and reversed the minibus as directed and drove off in the opposite direction, which was the same way we came. I followed the route for about 10 minutes. During that time all Wayne was telling me was 'drive'. He was in the middle of the bus standing. The lights in the bus were off. I do not know if Wayne knew I could drive. I do not have a driver's licence or a permit to drive, but I have had a little experience in driving. Wayne had the gun in his hand all the time. He told me to make the next right turn which I did. He told me to follow the road. I heard both of them talking to the driver and the conductress. They were saying to them to take off their clothes. Wayne told the driver to lay down flat on his face in the aisle. After that Robin told him to hurry up and get down on the ground. Orlando

came up to the front of the bus. He asked me what I was going to do. I told him I do not know. He sat in the front seat. About 20 minutes afterwards Wayne came to the front of the bus and asked me if I didn't want any of this. I asked him any of what? He told me any of the conductress. I told him no, they get me in this far enough already. He still had the gun in his hand. After driving for about 45 minutes Wayne told me to stop. I pulled to the left and stopped. He told me to get up and he got behind the wheel. I stood up next to him by the engine. Wayne drove off. Orlando moved from the front seat and went in the seat behind the driver. We had then arrived at Belleplaine near the [15] Alleyne School, which I recognised. Wayne shouted back and asked Robin which was the best road to take, left or keep straight. I told him to keep straight. I did this because the police station was coming up. When the bus got near the police station Wayne looked back and shouted: 'What's going on there?' As I looked back the emergency door of the minibus was open and the driver was baling out. This was just before the bus got to the police station. During the journey I did not see anyone having sexual intercourse with the conductress. I did not hear her complain at any time. I did not hear the driver complain at any time. Orlando got up and jumped out the same door that was open and I did the same thing. Robin and Wayne jumped out of the bus too. The bus had swerved to the left and the front wheel dropped into the gutter and the minibus came to a stop. I did not see the conductress. 4 of us ran across the pasture. I stopped at the first set of bush I came to and ducked down. I do not know where Orlando disappeared. I heard when a police car stopped at the scene. I got up and was going back to the scene. Wayne and Robin asked me where I was going. I told them I was not going anywhere because I was afraid of what they might do to me. They told me to come that we were going under the clamma cherry trees. I knew Wayne still had the gun and I was not taking a risk. We just sat under the tree until 3.00 a.m. There was no conversation for about 2 hours. We had crossed a pasture, crossed the road and onto another pasture. Wayne got up and said to let us leave here. I told him to go ahead that my feet were a bit tired from running. He said: 'No, you come'. He lead the way along the East Coast Road to a junction. We got into a 5.00 am bus going to Bridgetown. When we got to Bridgetown they told me to get in the first Silver Sands van that came along. I got to Bridgetown about 5.45 a.m. I heard the news on the radio about a minibus that was robbed in St. Peter and the conductress was raped and the police were looking for 4 men. That is when I got more frightened. I went home and thought about everything. I heard the police had held Wayne and Robin. I left home and kept in hiding because I was scared. I did not rob or rape anyone, nor did I take part in any plan to rob or rape anyone. This statement is true. I have obtained legal advice from my Attorney-at-law and I have been told that I have a right to remain silent. I have chosen to exercise my right to remain silent and I present this statement to the police with the understanding that my right to remain silent will be honoured. I do not wish to make any further statement (oral or written) to the Police. I have also been medically examined by a doctor before surrendering to the police and I am in good health."

[32] The learned Judge also reminded them of Forde's unsworn statement from the dock (p 456):

"My name is Peter O'Neal Forde. I am 22 years of age. I am or was a ZR conductor from the age of 15 years old. I was not part of any plan nor did I take part in any way to rob or rape anybody on this earth. The statement that I have given to the police is true and I guess that is it, sir." [16]

[33] The learned Judge told the jury that the defence being put by the appellant Forde was that he knew nothing about any plan to ravish or rob the virtual complainant.

[34] Continuing to put Forde's defence to the jury the learned Judge said at pp 518 and 519 of the record:

"In Forde's case also he said that the statement he gave -- he said in his unsworn statement from the dock that the statement he gave to the police is true and in that statement he said that he was on the minibus at the critical time but that he was under duress and I must therefore give you a direction on duress. He says that he should not be found guilty of these offences because he took no part in them and at the time he was forced to do so.

The law is that it is a defence to a criminal charge that a man committed an offence when acting under duress. If that is so, he is to be found not guilty.

'What then is duress? Duress consists of threats by words spoken, and/or conduct on the part of some other person or persons, or a combination of circumstances which drives a man to commit the offence because at the time he takes part in it he reasonably believes that he has good cause to fear that he will be killed or seriously injured if he does not do so, and which conduct would, in your judgement, have driven any sober person of reasonable firmness of the accused man's sex and age to do the same thing.'

The accused man Forde claims that at the time he was acting under duress. In the written statement allegedly made by him and admitted into evidence as Exhibit L the following appears: "He pointed a gun at me and told me that I am the one who got to drive the minibus from up here. He said that is why he brought me along. He ordered me to drive. I got into the driver's seat as ordered. For a while he was watching me with the gun in hand. Wayne had the gun in his hand all the time". And the accused Forde has made his unsworn statement from the dock and he said that that written statement is true. However, it is not for him to prove that he was acting under duress. If he is to be found guilty of this offence, it is for the prosecution to make you feel sure that he was not.

First consider what, if any, threatening behaviour there was or intimidating circumstances there were. If you are sure that the accused Forde was not driven to do what he did because he reasonably believed and had good reason to fear that if he did [17] not he would be killed or seriously injured, that is the end of the matter and you must find him guilty; if, however, you decide that he acted as he did or may have done in that belief, you should go on to consider might a sober person of reasonable firmness of the accused man's sex and age faced with the same threats and intimidating circumstances have behaved in the same way and taken part in the offences? You should also take into account the characteristics. He said he was a minibus conductor. If you are sure that he would not have acted that way, then you must find the accused guilty. If you are not sure, you must find the accused not guilty.".

Lorde's Grounds of Appeal

[35] The amended grounds of appeal filed on behalf of Lorde are that:

1. The verdict is unsafe and unsatisfactory.

2. The Learned Trial Judge erred in law when he directed the jury that the contested written statement could corroborate the evidence of the complainant.

3. The Learned Trial Judge erred in law when he directed the jury to find certain facts.

4. The Learned Trial Judge erred in law by giving a direction to convict. (see page 464 line 20 - 31).

5. The Learned Trial Judge erred in law when he directed the jury as to the meaning of certain words. (See page 464 line 32).

6. The Learned Trial Judge erred in law by entering the arena and attempting to assist the Crown and discredit the defence. (See page 447 - 449).

7. The Learned Trial Judge erred in law when he allowed a known victim-support counsellor to sit in Court behind the virtual complainant during her evidence without consulting counsel.

8. The Learned Trial Judge erred in law when he directed the stenographer not to record part of the trial. (See page 337).

9. The Learned Trial Judge erred in law when he said to the witness Alistair Piggott that he knew if (giving evidence) might not be easy for (you) but (you) have to try.

10. The sentence is too severe.

Howell's Grounds of Appeal

[36] The amended grounds of appeal filed on behalf of Howell are that: [18]

1. The Learned Trial Judge misdirected the jury as to the 'mens rea' for the offence of rape.

2. The Learned Trial Judge misdirected the jury as to the evidence which was capable of amounting to corroboration.

3. The Learned Trial Judge erred in law in joining the issues of admissibility of a confession statement together with the issue of corroboration.

4. The Learned Trial Judge misdirected the jury as to the principle of joint enterprise.

5. The Learned Trial Judge erred in law in inviting the jury to find that intention could have been proved and established by things said or acts done after the alleged commission of the offence.

6. The Learned Trial Judge erred in law in that the direction as to proof of intention may have been reasonably though improperly interpreted by the jury by things said or acts done after the alleged commission of the offence.

7. The Learned Trial Judge erred in law in the direction to the jury upon the basis of the principle in 'R. v. Turnbull' in that the jury could reasonably though improperly have concluded that a good identification by a witness may have constituted a good identification by the complainant as to the commission of the alleged offence.

8a) The Learned Trial Judge misdirected the jury in erroneously directing them to find that there was no challenge to the complainant's testimony that she was raped or robbed by the Appellant Robin Dwayne Howell.

8b) The Learned Trial Judge erred in inviting the jury to reach a conclusion as to Appellant Howell's guilt unfairly and on a basis which was not consistent with the evidence.

8c) The Learned Trial Judge erred in dis-allowing cross-examination which further sought to challenge the testimony of the complainant.

9. The Learned Trial Judge erred in law in that his direction to the jury equivocated as to whether the case against Appellant Howell was based on joint enterprise or sole participation. [19]

10. The verdict is against the weight of evidence.

11. The sentences are excessive.

Forde's Grounds of Appeal

[37] The amended grounds of appeal filed on behalf of Forde are that:

1. The Learned Trial Judge failed to direct the Jury that the evidence relating to the possession of the Complainant's jewelry was not in fact evidence that the Appellant robbed and raped the virtual Complainant and that this evidence was open to inferences which were more favourable to the Appellant and should have been construed as such.

2. The Learned Trial Judge failed to direct the Jury's mind to and point out the evidence which could have been considered by them in relation to the Appellant Forde being party to a plan to rob and rape the virtual Complainant and more specifically, the Learned Trial Judge failed to direct the jury that there was no such evidence of Forde being a party to such a plan.

3. That the Learned Trial Judge, when dealing with the issue of identification as it related to the Appellant Forde, failed to direct the Jury's mind to the fact that the virtual Complainant never identified the Appellant as one of the persons who raped and robbed her on the night in question and furthermore, the Learned Trial Judge misdirected the jury by informing them that the Crown's case rested on the evidence of Alistair Piggott who identified Forde as one of those men who remained on the bus and ravished and robbed Gail Ann The virtual complainant.

4. That the Learned Trial Judge failed to properly direct the Jury on the issue of duress as it related to the statement of the Appellant, Peter Forde.

5. That in all the circumstances of this case the verdict is unsafe and/or unsatisfactory.

6. That the sentence is manifestly excessive in the circumstances. [20]

7.

Ground 6 of Lorde's appeal and Ground 8(a) (b) and (c) of Howell's appeal.

[38] These grounds of appeal allege that the learned judge erred in law by entering the arena by attempting to assist the Crown and to discredit the defence and by disallowing cross-examination which sought to clarify the testimony of the complainant .

[39] It is contended as follows:

(a) Throughout the trial there were a significant number of interventions by the learned judge during cross-examination and those interventions prevented or muzzled defence Counsel from advancing and developing their respective defences;

(b) The interventions coming as often as they did and the content of those interventions were such that the defence would have been discredited in the eyes of the jury;

(c) Throughout the trial comments were made by the trial judge which characterised the defence as weak, insincere and without merit, in the presence of the jury;

(d) The attitude of the learned judge to the defence and the treatment of Counsel throughout the trial abridged the right of the appellants to a fair trial;

(e) Throughout the trial the learned judge prevented witnesses from answering questions, without explanation;

(f) The learned judge's conduct throughout the trial and the frequent exchanges between the learned judge and Counsel amounted to a material irregularity.

[40] We now turn to some of the relevant parts of the record in respect of which complaint is made.

[41] First, at page 447, there is an exchange between Counsel for the appellant Forde and the Court. The passages run:

MR. WORRELL: Yes, My Lord.

THE COURT: Yes, Mr. Worell. [21]

MR. WORRELL: I believe, My Lord, my learned friend Mr. Thorne had indicated to your Lordship that I would like to make a submission. I rise to make that submission on behalf of the accused Peter Forde. My Lord.

THE COURT: Yes, I'm listening.

MR. WORRELL: Absence of the jury, My Lord. I think that is the normal procedure.

THE COURT: Have you looked at the statement, Mr. Worrell?

MR. WORELL: Pardon me, sir?

THE COURT: You disputed the statement, accused's statement? You didn't dispute the statement.

MR. WORRELL: No. I didn't dispute the statement, not at all.

THE COURT: Very well. You want to make a submission. I'll hear you.

MR. WORRELL: Yes, My Lord.

THE COURT: Mr. Foreman and members of the jury, I shall have to ask you to withdraw. You will be under the guidance of the marshals. Any questions you have you should put through the marshals. And Mr. Foreman and members of the jury, please don't discuss the case.

(Two marshals sworn)

(Jury withdraws under sworn marshals at 12:49 p.m.)

MR. WORRELL: Just crave the Court's indulgence, My Lord. I just want to know what is the last comment that Ms. Alleyne has after I said I wanted to make an application. I just want to know what is recorded there, My Lord.

(Reporter reads back record)

All I'm saying that is highly improper because that statement, My Lord - -

THE COURT: Make your submission.

MR. WORRELL: -- that statement, My Lord, if I may finish, My Lord, with all due respect, that statement was a complete denial and to say that in front of the jury is highly prejudicial. I think your Lordship knows far better than that.

THE COURT: Let me tell you something. This is a court of law and I will not take that sort of thing from you. I'm going to [22]tell you now, and this is your warning and put it in your pipe and smoke it, if you have a submission to make, proceed and make it.

MR. WORRELL: My Lord, I have a submission to make but I also have the right to represent my client.

THE COURT: Well, --

MR. WORRELL: And I know your Lordship is a very fair person. I know that. That is why that comment really, My Lord, you know --

THE COURT: Look, the jury will have the statement, it is evidence.

MR. WORRELL: My Lord, that is correct so why make that comment in front of the jury? that is all I'm saying. Why make that comment in front of the jury? "Mr. Worrell, you have a submission to make, I will hear your submission", in front of the jury. "You looked at this statement, Mr. Worrell? I've never seen that done, My Lord. Never.

THE COURT: No?

MR. WORRELL: Never, My Lord.

THE COURT: Have you disputed the statement Mr. Worrell?

MR. WORRELL: Yes, My Lord, I never -- I don't have to dispute the statement, My Lord.

THE COURT: Have you disputed the statement?

MR. WORRELL: No, My Lord, I didn't dispute it because it is a denial. A total denial.

THE COURT: Well, let's hear the submission.

MR. WORRELL: A total denial, My Lord. And I'm not going to run away from it, My Lord, if it is a total denial. And I'm going to stand here and do my best for him because every man deserves a chance. If it was my learned friend, My Lord, Mr. Thorne, I would be doing it for him, or Mr. Saddler.

THE COURT: Will you please make your submission.

[42] Second, we turn to pages 57 - 59 where a somewhat similar situation arose during the re-examination by the prosecution of its witness Piggott. The passages read as follows: [23]

Q: MR. PIGGOTT: You said in answer to my learned friend

Ms. Comissiong that I didn't see him going to the back of the bus, meaning Lorde.

MR. PILGRIM: With respect, what is the confusion raised there? I think my friend should perhaps point out the confusion that he's seeking to clarify. I don't see any confusion from that, it is a yes or no.

THE COURT: Well, unless you want to come there and give evidence, then please sit down.

MR. PILGRIM: My Lord, I'm making a specific objection. I don't just sit down.

THE COURT: An objection to what?

MR. PILGRIM: To the question that's posed. If that is the first limb of the question it must reveal somewhere there in the vagueness that he's seeking to clarify.

THE COURT: Would you please let Mr. Saddler ask his question.

MR. PILGRIM: I beg your pardon.

THE COURT: I don't know what it is --

MR. SADDLER: I think it is proper for Ms. Comissiong to object, if anything, My Lord.

MR. PILGRIM: I think I'm entitled to object.

THE COURT: You are and you have objected.

Yes, Mr. Saddler.

MR. SADDLER.

Q. You said I didn't see him going to the back of the bus. Could he have gone to the back of the bus --

MR. PILGRIM: No, My Lord, no, My Lord, that cannot possibly be something that arose on cross-examination. This is now cross-examination. He's trying to squeeze out something -

THE COURT: Will you please sit down, Mr. Pilgrim.

MR. PILGRIM: My Lord, can I make my objection?

THE COURT: I have heard your objection.

MR. PILGRIM: And your Lordship will rule? [24]

THE COURT: I have heard your objection and I am asking you please take your seat.

MR. PILGRIM: With difficulty, My Lord.

THE COURT: Mr. Saddler.

MS. COMISSIONG: My Lord, I also have a problem with the same question.

THE COURT: And your objection is also noted, Mrs. Comissiong.

MS. COMISSIONG: Very well, sir.

THE COURT: Mr. Saddler.

MR. SADDLER: Yes, sir.

THE COURT: Put your question.

MR. SADDLER:

Q. You said I didn't see him going to the back of the bus and I'm asking you, could he have, given your movement --

MR. PILGRIM: So your Lordship has ruled on the objection?

THE COURT: Yes, I have ruled on the objection and I asked you to take your seat.

MR. PILGRIM: But, My Lord, taking my seat does not confirm that you have overruled the objection.

THE COURT: I have overruled you many times and you refuse to take your seat and don't let us get into that again. Please take your seat. You are overruled.

MR. PILGRIM: Please let us get what is behind that. My concern is if your Lordship does not say to us that the objection is overruled, we will not know that. If that does not take place, we are not in a position to properly advise our clients. We must know when we make objections if they are overruled or not. Telling people to sit down or take their seats has nothing to do with the objection that is lodged, with the greatest respect.

THE COURT: Mr. Saddler, your question.

MR. SADDLER: [25]

Q. I didn't see - - You said I didn't see him going to the back of the bus. Given your movement in the bus could he have gone to the back and you didn't see him?

MR. WORRELL: My Lord, that is highly speculative and I must rise to object. That is totally speculative.

MR. PILGRIM: Could he have gone.

MR. WORRELL: Could he. That is total speculation because he could say all sorts of things, My Lord, and it still leaves the jury in a quandary. It has left me in a quandary.

MR. SADDLER:

Q. Were you watching him the whole duration of the journey?

MS. COMISSIONG: My Lord, I am objecting to that question because the answer is plain. “I did not see the guy go to the back of the bus”. It is clear. I don’t know what clarity my learned friend is seeking.

THE COURT; You too are overruled. Sit down. "

[43] We turn next to p. 108 lines 14 - 23 where in the course of the complainant's cross-examination, Mr. Thorne was seeking to elicit from the witness matters relating to identification. This is contrary to what the judge told the jury in his summation, Mr. Thorne contended. The passage reads:

"Q. Did they ask you the ages?

A. They asked me around what age.

Q. Around what age. And it is your evidence that you were unable to give the police approximate ages?

A. I remember telling the police that they were --

Q. Let’s deal with age. Let’s focus on age. My question is if you remember telling the police approximate ages.

THE COURT: And she said no.

MR. THORNE: Thank you, sir." [26]

[44] Then, to page 109 lines 8 - 23 where Mr. Thorne contends that the learned judge intervened and prevented the complainant from answering a question without explanation. The passage reads:
A. No, sir, I heard voices but I could not understand what they were saying. They were talking soft.

Q. Oh, I see. I see. Has the counsellor used the word traumatised?

A. Yes, sir.

Q. May I ask if that word has been used to describe your condition on the night in question? Have they suggested to you that you were traumatised on the night in question?

THE COURT: What has that got to do with the issue here?

MR. THORNE: I’ll ask her directly instead of asking about the counsellor.

Q. Were you traumatised --

MR. SADDLER: My Lord - -

THE COURT: Please. Don’t answer that question.

MR. THORNE: As your Lordship pleases.

[45] Then to page 111 lines 9 - 35 where in the course of the cross-examination of the complainant the judge intervened and Mr. Thorne complains that he was prevented from developing his defence. The passage reads:

Q. I'm not trying to make it difficult for you. Men got on the bus during its journey?

A. Yes, sir.

Q. And men got off the bus during its journey?

A: Yes, sir.

Q. And I'm suggesting to you that it is --

THE COURT: Ask her a direct question. [27]

MR. THORNE:

Q. Are you able to tell the Court what those various men looked like?

THE COURT: Don't answer that question.

MR. THORNE: You told me to ask it, My Lord.

Q. Now, this incident, this unfortunate incident lasted for about what, the ordeal lasted for about 40 minutes?

MR. SADDLER: She said over an hour.

THE COURT: She couldn't be sure, an hour, an hour and a half, two hours.

MR. THORNE: Much obliged, sir.

Q. And you told my learned friend you gave no permission. That is quite clear, I think. May I suggest to you that you were disgusted by the whole thing.

THE COURT: Please ask her a direct question.

MR. THORNE: That's a direct question.

THE COURT: A suggestion is not a direct question, a suggestion is a suggestion, a direct question is a direct question.

MR. THORNE: Obliged to you, sir.

[46] Later at page 216 line 34 to page 219 line 4 there were exchanges between the learned judge and Counsel. The passage runs:

MR. THORNE: If it pleases the Court, it remains my duty to renew my application to have the statement edited insofar as it makes reference to my client, sir.

THE COURT: And it remains my duty to remind you that there is a standard direction for the jury which I will give to them.

MR. THORNE: As your Lordship pleases. If I may add, sir, one is mindful of the Garnes case in which the Court of Appeal did make reference to the fact that counsel had failed -- let me say it like that -- had failed to make the objection so that perhaps this is precautionary.

THE COURT: Well, I rely on Blackstone's Criminal Evidence. That is my guidance in this case. [28]

MR. THORNE: That is excellent authority, My Lord.

THE COURT: Thank you.

MS. COMISSIONG: My Lord, I will be making an official objection to the admissibility of the oral statements which are going to be given by this officer as well as the written statement.

THE COURT: Grounds?

MS. COMISSIONG: The grounds generally being the way in which the statements were taken, the manner in which they were taken which were contrary to his constitutional rights, as well as the fact that he had been subjected to physical punishment from the officers and threats. And my instructions are that he did not even give that statement, the written statement to the officers. They brought him a statement after he had been physically beaten to be signed.

THE COURT: Mrs. Comissiong, you know, you're saying that you're objecting on the grounds that this statement was not voluntary. Is that what you're saying?

MS. COMISSIONG: That's correct.

THE COURT: And you're also objecting on the grounds that it wasn't made?

MS. COMISSIONG: The oral statements were given contrary to his constitutional rights but the written statement, he did not write it. I beg your pardon, sir?

THE COURT: You know that each ground has a different procedure? A rolled up plea, that is what you're doing now. Mr. Saddler?

MR. SADDLER: My Lord?

THE COURT: I think Mrs. Comissiong is objecting on all grounds that are possible.

MR. SADDLER: Objection to both orals and written?

THE COURT: On all possible grounds. So perhaps she can tell us what she wants.

MR. SADDLER: My Lord, I need specific grounds of objection. [29]

THE COURT: Well, as I said, she's objecting under section 13 (2) of the Constitution. She is also objecting on the ground that his statements weren't made. And she's objecting on the ground that they weren't voluntary.

MR. SADDLER: Never made. And if made --

THE COURT: She didn't said if made, she didn't say if made. I mean, if they weren't made that is one procedure and if they were made but not voluntary that is another procedure.

What do you want, Mrs. Comissiong? Do you want the jury withdrawn?

MS. COMISSIONG: Well, my previous experiences in these courts, I would rather have the jury stay where they are because my submission, sir, is that the statements which were made were made contrary to his constitutional rights. That's it. But the written statement which was supposed to have been taken by this officer, he did not make that written statement.

THE COURT: You're saying something else.

MS. COMISSIONG: I will make the -- my cross-examination --

THE COURT: Please, do you want the jury withdrawn or not?

MS. COMISSIONG: I will make my cross-examinations in the present of the jury.

THE COURT: So you want the jury to stay?

MS. COMISSIONG: That's correct, sir.

THE COURT: Thank you. Yes, Mr. Saddler, proceed.

[47] Counsel for the appellants referred the Court to three cases Frank Sharp v. R (1994) 98 Cr. App. R 144, Fraser Marr v. R. 1990 90 Cr. App. R. p. 154 and Vincent Joseph Wood v. R 1996 1Cr. App. R. 207.

[48] In Frank Sharp the third paragraph of the headnote reads as follows:

"A judge should not intervene, when cross-examination is being conducted by competent counsel, save to clarify matters which he did not understand or thought the jury might not have understood. If a judge wishes to ask questions about matters not touched within cross-examination, he should wait until the end of the cross-examination. If the judge's interventions and [30] criticisms of counsel are unnecessary and unjustified, this can result in the quashing of the conviction on the ground of a material irregularity in the trial."

[49] Stuart-Smith L.J. in delivering the judgment of the Court of the Appeal said at pp 152 and 153.

"There were a very considerable number of interruptions by the judge in the course of the cross-examination of Mr. Brodie and M. Lees, but Mr. Tonking has concentrated our attention on seven in particular. The law on this matter was stated by Purchase L.J. in Matthews and Matthews (1984) 78 Cr. App. R. 23 where after reviewing the authorities, at p. 32, he said:

'To summarise these authorities the following propositions appear to emerge: (1) Whilst a large number of interruptions must put this Court on notice of the possibility of a denial of justice, mere statistics are not of themselves decisive; (2) The critical aspect of the investigation is the quality of the interventions as they relate to the attitude of the judge as might be observed by the jury and the effect that the interventions have either upon the orderly, proper and lucid deployment of the case for the defendant by his advocate or upon the efficacy of the attack to be made on the defendant's behalf upon vital prosecution witnesses by cross-examination administered by his advocate on his behalf; (3) In analysing the overall effect of the interventions, quantity and quality cannot be considered in isolation, but will react the one upon the other; but the question which is posed ultimately for this court is 'Might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing-up of the judge, be such that the jury's verdict might be unsafe?' In the presence of conditions in which this Court has been alerted in the manner to which we have referred, it appears to us that if there is a possibility of a denial of justice then this Court ought to intervene.'

When a judge intervenes in the course of examination, or particularly cross-examination, a number of problems can arise depending on the frequency and manner of the interruptions. First the judge may be in danger of seeming to enter the arena in the sense that he may appear partial to one side or the other. This may arise from the hostile tone of questioning or implied criticism of counsel who is conducting the examination or cross-examination, or if the judge is impressed by a witness, perhaps suggesting excuses or explanations for a witness's conduct which is open to attack by counsel for the opposite party. [31]

Quite apart from this, frequent interruptions may so disrupt the thread of cross-examination that counsel's task may be seriously hampered. In a case of any complexity, cross-examination of the principal witnesses is something that calls for careful preparation and planning. It is the most

important part of the advocate's art, because a competent cross-examination is designed to weaken or destroy the opponent's case and to gain support for the client's case. But it is easier said than done. If the judge intervenes at a crucial point where the witness is being constrained to make an important admission, it can have an adverse effect on the trial.

In general, when a cross-examination is being conducted by competent counsel a judge should not intervene, save to clarify matters he does not understand or thinks the jury may not understand. If he wishes to ask questions about matters that have not been touched upon it is generally better to wait until the end of the examination or cross-examination. This is no doubt a counsel of perfection and a judge should not be criticised for occasional transgressions, still less can it be said in such cases that there is any irregularity in the conduct of the trial or that the verdict is unsafe or unsatisfactory. But there may come a time, depending on the nature and frequency of the interruptions, that a reviewing court is of the opinion that defence counsel was so hampered in the way he properly wished to conduct the cross-examination that the judge's conduct amounts to a material irregularity."

[50] In Fraser Marr the Lord Chief Justice in delivering the judgment of the Court said at p. 156:

"The appellant complains that the learned judge conducted the case in such a way that the appellant was not, to put it bluntly, given a fair run,

No one could doubt that if the allegations made by the prosecution were true, this was a singularly unattractive crime, earning the offender no sort of sympathy. Likewise the nature of the defence was, to say the very least, most unimpressive. It is however an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge. Indeed it is probably true to say that it is just in those cases where the cards seem to be stacked most heavily against the defendant that the judge should be most scrupulous to ensure that nothing untoward takes place which might exacerbate the defendant's difficulties." [32]

[51] In Vincent Joseph Wood two issues are raised in the headnote. Whether press coverage caused real risk of prejudice against the defendant and whether the convictions are unsafe and unsatisfactory as a result. Secondly, whether the conduct of the judge, his hostile manner and tone whether they amounted to a material irregularity.

[52] Staughton L.J. in delivering the judgment of the Court said at p. 215:

"As to the tone of voice used in the summing-up, pressed by this court to say whether it was neutral, Mr. Nutting agreed that it was not. That is as far as the agreement goes. We were referred to the case of Mears v. R (1993) 97 Cr. App. R. 239, and to this passage in the advice of the Judicial Committee delivered by Lord Lane at pp 243, 244:

'The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the appellant's submission that the comments of the judge were unfairly weighed against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurption may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L.J. observed in Gilbey (unreported) January 26, 1990:

'A judge … is not entitled to comment in such a way as to make the summing-up as a whole unbalanced ... It cannot be said too often or too strongly that a summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'

Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into [33] error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular case is not likely to be an easy decision. Moreover, the Board is reluctant to differ from the Court of Appeal in assessing the weight of any misdirections. Here their Lordships have to take the summing-up as a whole as Mr. Andrade submitted, and then ask themselves in the words of Lord Sumner in Ibrahim v. R. [1914] A.C. 599, 615, whether there was:

'Something which… deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future.'

Their Lordships consider that the judge's comments already cited went beyond the proper bounds of judicial comments and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting."

[53] In the very recent Privy Council case from the Court of Appeal of the Cayman Islands Randall v. The Queen Privy Council Appeal No. 22 of 2001, delivered on April 16, 2002. Lord Bingham in giving the judgment of the Board said:

"It is the responsibility of the judge to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence. He must neither be nor appear to be partisan. If counsel begin to misbehave he must at once exert his authority to require the observance of accepted standards of conduct. He should not disparage the defendant in the course of the evidence. Nor should he disparage defence counsel, since jurors inevitably tend to identify clients with their counsel. Sometimes a trial judge may have briefly to check or rebuke counsel. If however he has occasion, in any serious or sustained manner, to criticise the conduct of the defence case or to criticise or rebuke defending counsel, it will usually be prudent for the judge to do so in the absence of the jury and he should ensure that his disapproval of or irritation with counsel does not affect the jury's judgment. If he chooses to express personal opinions in the course of the summing up, he

should do so in a restrained, moderate and balanced way." [34]

Conclusion

[54] We agree that trial judges should as far as possible, avoid exchanges with Counsel and making unnecessary and unjustified criticisms of Counsel, in the presence of the jury. We endorse the views expressed in Frank Sharp that a judge should not intervene when cross-examination is being conducted by competent counsel, save to clarify matters which he did not understand or thought the jury might not have understood. We also support the view that trial judges should intervene to curb prolixity and repetition and to exclude irrelevance.

[55] We are of opinion having carefully examined the record, the submissions of counsel and the authorities cited that none of the matters about which complaint is made undermined the defence, denied the appellants a fair trial or went beyond the boundaries of appropriate judicial conduct.

[56] In the circumstances, we feel further that the trial judge in his summation gave to the defence of each appellant the balanced treatment and consideration which is its due in a criminal trial. Accordingly these grounds fail.

Ground 2 of Lorde's Appeal and Ground 3 of Howell's appeal.

[57] The complaint essentially is that the learned judge erred in law when he directed the jury that the contested written statement could corroborate the evidence of the complainant.

[58] The record shows that in the course of his summation in dealing with corro-boration the learned judge gave the following directions (pp. 462-464):

"Now, I turn to the question which is important in cases of this type, the matter of corroboration. Section 28 of the Sexual Offences Act deals with corroboration and provides that where an accused is charged with an offence under that Act -- and as I've told you rape is an offence under that Act -- no corroboration is required for a conviction, and the judge shall [35] warn the jury that it may be unsafe to find the accused guilty in the absence of corroboration.

So, Mr. Foreman and members of the jury, it is my duty to warn you, the jury, that it is unsafe to find the accused guilty in the absence of corroboration of the evidence of the complainant. Complainants, especially females in this sort of case, have been known to fabricate charges against men to get them into trouble and if a charge is fabricated, if a charge is made up, it becomes very difficult to refute that charge.

Mr. Foreman and members of the jury, what then is corroboration? Corroboration is evidence of independent testimony which affects the accused by connecting him, or tending to connect him, with the crime. That is, corroboration is evidence which implicates the accused which confirms in some material particular not only that the crime was committed, but also that the accused committed the crime. So that the three essential ingredients of corroboration or corroborative evidence is that it must be material, it must come from a source independent of the complainant, and it must implicate the accused man.

In this case, Mr. Foreman and members of the jury, in respect of the accused man Lorde, he is alleged to have given a written statement to the police in which he is alleged to have said "I turn she round and start to screw she from behind but I really ain't do it too long 'cause I did frighten and I did feel for she 'cause she did trembling all the time". Those words, Mr. Foreman and members of the jury, are capable of amounting to corroboration because they are material, they come from a source independent of the virtual complainant, and they implicate the accused man Lorde in the crime of rape if you believe his statement allegedly given to the police by the accused man Lorde.

In respect of the accused man Howell, he is alleged to have given a written statement to the police in which he is alleged to have said, "when he did finish I start to screw she. I discharged pun she belly". Those words, Mr. Foreman and members of the jury, are capable of amounting to corroboration because they are material, they come from a source independent of the virtual complainant, and they implicate the accused man Howell in the crime of rape if you believe the statement allegedly given to the police by the accused man Howell.

If, however, you reject the statements allegedly made to the police by the accused men Howell and Lorde, there will be no evidence in respect of the charge of rape capable of amounting to corroboration in the case against Howell or Lorde. [36]

I must tell you with respect to the accused man Forde that there is no evidence capable of amounting to corroboration. I have told you that corroboration is not required as a matter of law for a conviction. So if, bearing the warning I have given you in mind that it is unsafe to find the accused guilty in the absence of corroboration, and having given full weight to that warning, you are convinced and feel sure that the complainant is speaking the truth and that it is completely safe to act on her evidence, it is open to you to convict any accused or all of the accused."

[59] As a matter of law, no fault can be found with the learned judge's directions. Our view is that there is no merit in this ground.

Grounds 3 and 4 of Lorde's Appeal

[60] Ground 3 is that the learned judge erred in law by directing the jury to find certain facts and ground 4 alleges that he erred in law by giving a direction to convict.

[61] The record shows that in the course of his summation the learned judge said (p. 464):

"Mr. Foreman and members of the jury, you are men and women of the world. Alistair Piggott got off the minibus B192 by using the emergency button to open the door through which he left the bus wearing only a shirt and underpants and he went into the Belleplaine police station. The

minibus later came to rest in a ditch and the complainant got off the bus and went into the Belleplaine police station clothed only in a skirt. Do you think that she made up a story of rape and robbery? Do you think she would disport herself thus in the dead of night in order to get men into trouble? That is a matter for you, whatever you think. You and you alone must determine the facts.".

[62] The submission is that the learned judge by giving the jury certain facts, then offering them two rhetorical questions and certain conclusions is sufficient to destroy the chances of a fair trial for the appellant Lorde.

[63] Having analysed the foregoing passage it is our view that the learned trial judge was directing the jury's attention to the evidence that was led on this [37] aspect of the trial and was highlighting some questions which they may have wished to consider in determining the facts.

[64] We do not agree that in essence the learned trial judge was determining the facts by posing the questions for the jury's consideration and as such was giving a direction to convict. Counsel's contentions are therefore without substance.

Ground 7 of Lorde's appeal

[65] This ground alleges that the learned judge erred in law by allowing a known victim - support counsellor to sit in Court behind the complainant during her evidence without consulting Counsel.

[66] This Court is not persuaded that any appellant was prejudiced by the presence of the counsellor in court sitting behind the complainant. We do not find any merit in this ground.

Ground 8 of Lorde's appeal.

[67] There is likewise no merit in the submission that the learned judge erred in law when he directed the stenographer not to record part of the trial. Neither of the counsel was able to enlighten the Court as to what it was that the learned judge directed the stenographer not to record.

Ground 9 of Lorde's appeal

[68] The complaint in this ground is that the learned judge erred in law when he said to the witness Alistair Piggott that he knew it (giving evidence) might not be easy for (you) but (you) have to try. The submission is that the learned judge was commending the witness Piggott and was acknowledging his worth. There is no merit in the submission.

Ground 5 of Lorde's appeal

[69] This ground alleges that the learned judge erred in law when he directed the jury as to the meaning of certain words. [38]

[70] The record shows that in the course of his summation the trial judge said (pp. 464, 465):

"Now, I must also explain some words and expressions used in this trial. The word tek or take is now used in the Barbadian vernacular to mean rob. The word foop, f-o-o-p, is used in the Barbadian vernacular to mean sexual intercourse. The words fuck and screw are both defined in the concise Oxford Dictionary as coarse slang for sexual intercourse."

[71] Counsel submitted that it is not appropriate for the learned judge to say to the jury that that is the meaning of "tek", without more. It would have been more appropriate for him to have said to the jury "you're men and women of the world, look at this word, you know this word, you know Barbadians, put it in its context, what do you think it means?"

[72] We were referred to the case of Rodney Hinds v. The Queen Criminal Appeal No. 44 of 1998 where it was argued that the word 'sting' was not defined for the jury and therefore they had no guidance. This Court said at (p. 12):

"No evidence was lead that the word sting had a different meaning in Barbados or among Barbadians. Our concern is that the trial judge did not point out to the jury the true meaning of the word sting and deal specifically with this evidence on the question of intention."

[73] We are of opinion that the learned judge assisted the jury by pointing out the meaning of certain words and in that regard did nothing wrong. Accordingly, ground 5 of the appeal fails.

Ground 1 of Howell's appeal

[74] This ground alleges that the learned judge misdirected the jury as to the 'mens rea' for the offence of rape.

[75] The learned judge gave the jury the following directions (pp. 461- 462):

"Now, Mr. Foreman and your members, what is rape? Section 3 (1) of the Sexual Offences Act provides as follows: Any person who has sexual intercourse with another person without the consent of that person, and who knows that the other person [39] does not consent to the intercourse, or is reckless as to whether the other person consents to the intercourse, is guilty of the offence of rape. Subsection (2) of section 3 provides that no person -- no consent is obtained where the complainant submits or does not resist by reason of the application of force to the complainant, threats or fear of the application of force to the complainant, or intimidation of any kind.

So rape is committed where a person has sexual intercourse with another person without her consent and knows that she does not consent to the intercourse, or is reckless, that is that he doesn't care less whether she consents or not.".

[76] As a matter of law no fault can be found with the learned judge's direction. Accordingly, ground 1 fails.

Ground 3 of Howell's appeal

[77] Ground 3 alleges that the learned judge erred in law by joining the issue of admissibility of a confession statement together with the issue of corroboration. The submission is that the two issues were joined and ought to have been kept separate and apart so that the jury could properly deliberate on each issue.

[78] The learned judge said (at p 464):

"If, however, you reject the statements allegedly made to the police by the accused men Howell and Lorde, there will be no evidence in respect of the charge of rape capable of amounting to corroboration in the case against Howell or Lorde."

[79] We are of the opinion that this ground is misconceived in that the jury was not concerned with admissibility but rather with the weight to be given to the statement and whether it was true . This ground therefore fails.

Ground 4 of Howell's appeal

[80] Complaint is made that the learned judge misdirected the jury as to the principle of joint enterprise.

[81] The learned judge gave the jury the following directions (pp. 466 - 467)

"The Crown's case is that the three accused men committed the offences together. Where a criminal offence is committed by [40] two or more persons, each of them may play a different part but if they are acting together as part of a joint plan or agreement to commit it, they are each guilty. It is the law that where two or more persons form a plan to commit a crime, and proceed to put the agreed plan into execution, those who are party to the plan and who participate in the execution of the agreed plan become responsible for the acts of each other done in the course of furtherance of the plan.

The words plan and agreement do not mean that there has to be any formality about it. They don't have to have sat down and drawn up a plan and say this is what we're going to do. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look, or it can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each defendant shared a common intention to commit the offence and played his part in it, however great or small, so as to achieve that aim.

Your approach to the case, therefore, should be as follows: if, looking at the case of any accused, you are sure that he did an act or acts as part of a joint plan to commit the offences, he is guilty. Put simply, Mr. Foreman and members of the jury, the question for you is this: Were they in it together?"

[82] Counsel submitted that it is a misdirection for the learned judge to tell the jury that an agreement can be made with a nod or a wink. Such a direction is fraught with danger.

[83] There is no merit in the submission.

Grounds 5 and 6 of Howell's appeal

[84] These grounds allege that the learned judge erred in law by inviting or directing the jury to find that intention could be proved, established or interpreted by the jury by things said or acts done after the alleged commission of the offence.

[85] The learned judge gave the jury the following directions (p 468 of the record):

"Now, I turn to the question of intention of the accused. Intention, like every other ingredient which constitutes the offence with which an accused is charged must be proved. [41]

However, it is not possible to prove the intention of an accused person by positive evidence and in such a case intention becomes a matter of inference. Intention may therefore be implied from the overt acts of an accused. That is, you must look at all that he does at the time or all that he says at the time and if you can infer, and seek to find out if you can infer, what his intention was. You must look at what an accused person does and what he says at the critical time for that may give you a clue as to what his intention was.

Mr. Foreman and members of the jury, as regards the oral statements allegedly made by the accused men to the police witnesses in this case, as judges of fact you have two functions to perform. Firstly, you have to determine whether the words were indeed spoken and, secondly, if you find that those words were spoken, you have to ask yourselves what do those words mean. If you find that the words are capable of more than one meaning, then you must accept the meaning that is most favourable to the accused. You must bear this in mind when considering the oral statements allegedly made by the accused men to the police witnesses in this case. If you accept that those words were said, then what do they mean?"

[86] The submission is that as the direction on oral statements came immediately after the direction on intention the jury may have reasonably, though improperly, interpreted the direction to be saying that things said or acts done after the alleged commission of the offence may prove intention.

There is no merit in the submission. Accordingly grounds 5 and 6 fail.

Grounds 7 of Howell's appeal

[87] Complaint is made that the learned judge erred in law in the direction to the jury upon the basis of the principle in 'R v Turnbull' in that the jury could reasonably though improperly have concluded that a good identification by a witness may have constituted a good identification by the complainant as to the commission of the alleged offence.

[88] The learned judge gave the jury the following directions on identification (p. 473 - 474 of record)

Mr. Foreman and members of the jury, the question of identity of the accused men arises in this case. Dealing first with the question of identity, there are some passages from a case called [42] Turnbull which I will read to you because it is very important for you to approach this question of identity on a proper basis. Guidelines were laid down by this case called Turnbull, guidelines which must be observed by judges when the question of identity arises.

Firstly, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. In addition, he should instruct the jury as to the reasons for the need for such a warning and make reference to the possibility that a mistaken witness could be a convincing witness and that a number of such witnesses could all be mistaken.

So this is what you must consider in this case, whether the virtual complainant was mistaken when she identified the accused Howell as one of the men who ravished and robbed her on the 14th of July, 1995; whether Alistair Piggott was mistaken when he identified the accused men Lorde and Forde as two of the men who were on the minibus B 192 during the incident on the 14th of July, 1995; whether Fred Reifer was mistaken when he identified the accused man Howell as being on the minibus B192 and who sat next to Reifer on that bus on the journey to Mile And A Quarter in the parish of St. Peter on the night of the 13th of July, 1995; and whether Wayne Worrell and Ambrose White were mistaken when they identified the accused man Lorde as one of the men on the bus that night and as one of the four men Ambrose White left on the bus when he disembarked at French Village, St. Peter, the termination point for that minibus.

This must be given your due consideration and you must bear this possibility in mind.".

[89] Counsel submitted that the learned judge framed his directions on identification is such a manner as to lead the jury to consider the issue for its cumulative effect. This constitutes, he contended, a breach of evidential procedure. It is another way of saying, if you have four persons on the bus, Mr. Foreman and your Members, can four persons be wrong? It encourages the jury to consider numbers, to deal in quantity rather than with quality. The direction deprived the jury of considering each identification on its own merit. [43]

[90] In structuring his directions to the jury, the trial judge dealt with the identification evidence in relation to how it was given by the witnesses and we can find no basis upon which counsel's contentions can be supported. Accordingly, ground 7 of the appeal fails.

Grounds 9 and 10 of Howell's appeals

[91] These grounds were not argued.

Ground 1 of Forde's appeal

[92] Complaint is made that the learned judge failed to direct the jury that the evidence relating to the possession of the complainant's jewelry was not in fact evidence that Forde robbed and raped the complainant and that this evidence was open to inferences which were more favourable to Forde and should be construed as such.

[93] The relevant part of the learned judge's direction appears at page 516 of the record in these terms:

"The Crown's case against Peter O'Neale Forde rests (1) on the evidence of the virtual complainant who said that she was ravished and robbed by three men who remained on the bus after it had reached its final destination in French Village in the parish of St. Peter and the evidence of Alistair Piggott who identified Forde as one of those men; (2) the evidence of Michael Bailey to whom Forde allegedly lent a chain and pendant which was identified by the virtual complainant as her property which she had with her on the 14th of July, 1995 when she was ravished and robbed; (3) the oral statement allegedly made by the accused Forde in the presence of Sergeant Dawson and Michael Bailey, "that is the chain I gi he"; and the written statement, Exhibit L, which I have already read to you.".

[94] The thrust of Counsel's argument was that the learned judge should have made clear to the jury that because Forde was on the minibus on the morning of July 14, 1995 and a few days after lent Michael Bailey a chain and pendant which were identified by the complainant, as her property which she had with her in the mini-bus on the said July 14, when she was raped and [44] robbed is not conclusive evidence that Forde raped and robbed the complainant. If the jury were directed on this issue, Counsel contended, there could be no argument on his part because the learned judge would have directed their minds to it.

[95] We agree that there is merit in this ground.

Ground 2 of Forde's appeal

[96] Ground 2 complains that the learned judge failed to direct the jury's mind to and point out the evidence which could have been considered by them in relation to Forde being party to a plan to rob and rape the complainant and more specifically, the learned judge failed to direct the jury that there was no such evidence of Forde being a party to such a plan.

[97] The learned judge gave the jury the following directions on joint enterprise (page 466 of the record):

"The Crown's case is that the three accused men committed the offences together. Where a criminal offence is committed by two or more persons, each of them may play a different part but if they are acting together as part of a joint plan or agreement to commit it, they are each guilty. It is the law that where two or more persons form a plan to commit a crime, and proceed to put the agreed plan into execution, those who are party to the plan and who participate in the execution of the agreed plan become responsible for the acts of each other done in the course of furtherance of the plan.

The words plan and agreement do not mean that there has to be any formality about it. They don't have to have sat down and drawn up a plan and say this is what we're going to do. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look, or it can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each defendant shared a common intention to commit the offence and played his part in it, however great or small, so as to achieve that aim."

[98] No complaint has been made with regard to that direction. The case for the prosecution was that the three appellants were parties to a plan to ravish and rob the complainant. They went to the Lower Green Bus Stand in [45] Bridgetown sometime around 11 p.m. on July 13, 1995 and together boarded the minibus B 192 in order to execute their plan. They remained on that mini-bus throughout its journey to its final destination and bided their time until the last passenger disembarked from the bus at French Village and there and then they executed their plan by ravishing and robbing the complainant.

[99] The Crown was asking the jury to infer that there was a common design by the three men to rape and rob. The Crown's case therefore was that they were in it together and if on the evidence the jury found that they were indeed in it together, then it was open to the jury to draw the inference that the appellant Forde was party to the joint enterprise.

[100] The defence on the other hand denied participation in the rape and robbery, but contended that any participation by Forde in driving the minibus was under duress. What was left for the jury's determination was clearly an issue of fact which was resolved by their rejection of the plea of duress. There is no merit in this ground.

Ground 3 of Forde's appeal

[101] Ground 3 alleges that the learned judge, when dealing with the issue of identification as it related to Forde, failed to direct the jury's mind to the

fact that the complainant never identified Forde as one of the persons who raped and robbed her on the night in question and furthermore he misdirected the jury by informing them that the Crown's case rested on the evidence of Alistair Piggott who identified Forde as one of those men who remained on the bus and ravished and robbed the virtual complainant.

[102] The learned judge made it clear to the jury that the evidence of the complainant was that she was ravished and robbed by the three men who remained on the bus after it reached its final destination in French Village in [46] St. Peter. The complainant never said in her evidence that she identified Forde at an identification parade as one of the men who raped and robbed her. The evidence of the complainant was that she only identified Howell as being one of the men.

[103] Further, in the present case the complainant's evidence was that she was raped by four men. The second man who raped her was not the first man who had done so. The third man who raped her was not the first or second man, the fourth man who raped her was not the first, second or third man, and it was not the driver of the bus Piggott. She testified as to what each man did to her. Piggott's evidence was that Forde was on the bus. He never testified that Forde or any of the other three men on the bus raped or robbed the complainant. Forde himself in his written statement to the police supported Piggott's evidence that he was on the bus on the night of the incident. In his unsworn statement from the dock Forde said that his written statement is true. That was the state of his evidence on which the jury were asked to deliberate.

[104] There was ample evidence on which the jury could find that rape and robbery had been proved against the three accused men, including Forde.

Ground 4 of Forde's appeal

[105] Ground 4 alleges that the learned judge failed to direct the jury properly on the issue of duress as it related to Forde's statement.

[106] The learned judge gave the jury the following directions on duress (pp. 518 - 519):

"In Forde's case also he said that the statement he gave -- he said in his unsworn statement from the dock that the statement he gave to the police is true and in that statement he said that he was on the minibus at the critical time but that he was under duress and I must therefore give you a direction on duress. He says that he should not be found guilty of these offences [47] because he took no part in them and at the time he was forced to do so.

The law is that it is a defence to a criminal charge that a man committed an offence when acting under duress. If that is so, he is to be found not guilty.

What then is duress? Duress consists of threats by words spoken, and/or conduct on the part of some other person or persons, or a combination of circumstances which drives a man to commit the offence because at the time he takes part in it he reasonably believes that he has good cause to fear that he will be killed or seriously injured if he does not do so, and which conduct would, in your judgement, have driven any sober person of reasonable firmness of the accused man's sex and age to do the same thing.

The accused man Forde claims that at the time he was acting under duress. In the written statement allegedly made by him and admitted into evidence as Exhibit L the following appears: "He pointed a gun at me and told me that I am the one who got to drive the minibus from up here. He said that is why he brought me along. He ordered me to drive. I got into the driver's seat as ordered. For a while he was watching me with the gun in hand. Wayne had the gun in his hand all the time". And the accused Forde has made his unsworn statement from the dock and he said that that written statement is true. However, it is not for him to prove that he was acting under duress. If he is to be found guilty of this offence, it is for the prosecution to make you feel sure that he was not.

First consider what, if any, threatening behaviour there was or intimidating circumstances there were. If you are sure that the accused Forde was not driven to do what he did because he reasonably believed and had good reason to fear that if he did

not he would be killed or seriously injured, that is the end of the matter and you must find him guilty; if, however, you decide that he acted as he did or may have done in that belief, you should go on to consider might a sober person of reasonable firmness of the accused man's sex and age faced with the same threats and intimidating circumstances have behaved in the same way and taken part in the offences? You should also take into account the characteristics. He said he was a minibus conductor. If you are sure that he would not have acted that way, then you must find the accused guilty. If you are not sure, you must find the accused not guilty.".

[107] The submission is that Forde in his statement is saying that he did not commit these offences, he did not rob nor did he plan any robbery. He did not rape nor did he plan to rape anybody but he was forced to drive the [48] minibus on the night in question. He was under duress in respect of driving a bus. He was not under duress in respect of raping or robbing anybody. The question, counsel contended, has to be asked whether the learned judge's direction to the jury that Forde "says that he should not be found guilty of these offences because he took no part in them and at the time he was forced to do so" could not have confused the jury into believing that Forde's case was that he was there on the morning in question, he was raping, he was robbing but he was committing these acts because a gun was put to his head.

[108] In all the circumstances, the learned judge gave the jury the classic direction on duress. It was essentially a matter for the jury to determine what evidence they would accept or reject. They had before them Forde's statement in which he said that he was on the bus and that he was forced to drive the bus but took no part in the rape and robbery. They had the evidence of the complainant who said that the four men who were on the bus raped and robbed her.

[109] In our view, they rejected Forde's account of the incident and were satisfied that Forde raped and robbed the complainant and they returned their verdict accordingly. There is no substance in this ground.

Ground 5 of Forde's appeal

[110] We have carefully considered whether in light of our conclusion on ground 1, the verdict can be regarded as unsafe and unsatisfactory.

[111] The strength of the case against Forde lay (1) on the evidence of the virtual complainant who said that she was ravished and robbed by the three men who remained on the bus after it reached its final destination in French Village in St. Peter, (2) the evidence of Piggott who identified Forde as one [49] of the men who remained on the bus and (3) the statement of Forde that he was on the bus at the critical time.

[112] On the evidence as a whole we do not think that the verdict against Forde of guilty of rape and robbery can be said to be unsafe or unsatisfactory.

CONCLUSION

[113] In the opinion of this Court the offences of rape and robbery are both serious offences. The manner in which the complainant was raped and robbed, in particular the vicious attack on her body by the appellants and the other aggravating features of these crimes must be strongly condemned. Those who participate in such acts must be severely punished. However that may be, in our judgment the sentence for rape is excessive. In the result, the appeals against that sentence is allowed and the term of imprisonment of 30 years is reduced to 25 years. The sentences in each case will run concurrently and commence 6 weeks after the date of conviction. [50]

Justice of Appeal.

Justice of Appeal. Justice of Appeal.