COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCr. App. No. 23 of 2007

(CAIS No. 88 of 2007)

ROGER WATSON

Appellant

V

R E G I N A

Respondent

Before:	The Rt. Hon. Dame Sawyer, P The Hon. Mr Justice Osadebay, JA The Hon. Mr Justice Longley, JA
Appearances:	Appellant pro se on 2 July, 2008, Mr Wayne Munroe for the Appellant, Mr Jairam Mangra with him on 15 September, 2008, Ms E Sallyann Lockhart with him on 8 October and 6 November, 2008 Ms Sandradee Gardiner for the Respondent on 2 July, 2008; Mr Bernard Turner, Director of Public Prosecutions, Ms Yolande Rolle with him on 15 September, 2008, Director of Public Prosecutions On 8 October, 2008, Mr Vernal Collie on 6 November, 2008
Dates:	2 July, 15 September, 8 October, 6 November, 2008

25 June, 2009

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JUDGMENT

(Majority decision read by Sawyer, P.)

1. On 26 September, 2006, Roger Watson ("the appellant") was convicted of the murder of Eddison Curtis-Johnson ("the deceased") which occurred on 15 January, 2003, following a trial before Allen, Snr J and a jury in the Supreme Court. Due to delays in obtaining the required reports on the appellant, it was almost a full calendar year later that on 20 September, 2007, following a sentencing hearing, the appellant was sentenced to suffer death in the manner provided by law in accordance with section 2 of the Capital Punishment Procedure Act (Ch. 94).

2. He appeals to this court against his conviction and sentence on the following grounds:

> "1. The Learned trial Judge erred in directing the jury on the element of intention and transferred malice in the circumstances of the case.
>
> 2. The Learned trial Judge erred in directing the jury on the identification evidence in the case –
>
> (a) by failing to direct the jury on what they ought to do if they were uncertain about the truthfulness of the eyewitness evidence. [p. 487 Lines 3 – 17]
>
> (b) by failing to direct the jury on any doubt they may have had as a result of the discrepancy in the

evidence of the two eyewitnesses and how this should affect their treatment of the evidence. [p. 493 Lines 7 – 24]

(c) by not withdrawing the case from the jury when the quality of the identification evidence was poor and there were material discrepancies in the accounts of the two eyewitnesses – Turnbull at p. 229 H – p. 230A

(d) by failing to point out to the jury regarding when the eyewitnesses (T. Vincent and J Ferguson) would have known the Appellant that he would have been at a much younger age.

(e) Failing to put to the jury the danger of collusion between the witnesses [p. 259 lines 1 – 6]

3. The conduct of the trial by Defence counsel adversely prejudiced the case of the Appellant.

4. The Learned trial Judge erred in failing to properly put the defence of alibi to the jury.

5. In all the circumstances of the case the conviction is unsafe and unsatisfactory.

6. In all the circumstances of the case the sentence of death is manifestly excessive." (See the re-amended notice of appeal)

Background:

4. The factual background to the appeal may be summarised as follows:

5. There was an ongoing dispute between one Calvin Pinder, his younger brother, Lamont Munroe and the appellant. That dispute was about a young woman named Lydia who was also known as "Dia". Lydia used to date Munroe before she started dating the

appellant. On 25 December, 2002, according to the evidence of Lamont Munroe, an altercation took place between Lamont Munroe and the appellant at Step Street, Fox Hill in which the appellant tried to run him down with his Lexus jeep and Munroe threw a Guinness bottle and broke the rear windshield of the appellant's vehicle. The police intervened and ended that altercation. Then on 15 January, 2003, again according to Lamont Munroe, the appellant returned to Step Street driving his black Lexus vehicle and another confrontation between him and the appellant occurred and Munroe threw rocks at the appellant's vehicle. In contrast to Lamont Munroe's evidence, the evidence of the appellant's witness, D'Angelo Micklewhite, was that the incident on 15 January, 2003 was between the appellant and D'Angelo Micklewhite, not Lamont Munroe.

6. Trevor Vincent, who operated a barber shop in an annex to his residence at Ferguson Street, off Dorsette Street in Fox Hill, said that around 2.30 p. m., on 15 January, 2003, a confrontation took place between a man whom he knew as "Roger" and Lamont Munroe. This witness stated that he had known Roger from when the witness used to live in Sea Breeze Estates about 13 years before 2003 when he used to collect scrap metal using a trolley and Roger used to live through Marigold Farm Road. He said that he knew Roger's last name as Watson and that he also knew him as "Double R". He had only just started seeing Roger back in his area about a year before the incident. Trevor Vincent also said that in previous years he used to see Roger "on a regular basis". He said that he could identify Roger by his beard and glasses and he knew that Roger drove a blue Lexus "and carry on and different things like that".

7. Around 7.45 p.m., on 15 January, 2003, as Trevor Vincent was getting off from work, he said that he saw Roger passing through his corner, heading south and wearing a brown jacket with a "little nozzle" like a gun nozzle that had a strip on it, sticking out of Roger's jacket. When he saw Roger, the witness was approximately 25 feet away from where Trevor Vincent was standing under a big spot light which enabled him to see so far. At that time, the nearby street light was out but the witness said that he could see Roger because of the spotlight in the witness's yard and that there was nothing obstructing his view of Roger. This witness said that Roger was not wearing a hat or glasses that night when he saw him.

8. As Trevor Vincent and some of his friends were standing up talking, he said he heard about two gun shots fired, his friends ran into the house and locked the door; he tried to get in but could not so he ran and hid behind a garbage tin. While hiding behind that tin, he said he saw when a person walked more like in the road and then fired off a few other shots. He recognised that the person was "Double R". He later said that he heard eight more shots; the person stood up not in the road but on the side of the road and a couple of seconds later, a black jeep pulled up right in front of the witness' yard and Roger came walking down Ferguson Street and jumped into the jeep which drove off towards Bernard Road.

9. Trevor Cartwright, another witness, who lived in another house in the same yard as Calvin Pinder and who was related to Calvin Pinder admitted that when he gave evidence at the preliminary inquiry into this matter, he told the magistrate that he could not

describe the person who did the shooting that night because "it was dark – sort of" – see page 69 of the transcript.

10. John Ferguson, a relative of Trevor Vincent, said that around 8.00 p. m., after he got off from his job as a mechanic at premises on Bernard Road, he went through Ferguson Street where the person who was supposed to give him a lift home had gone to get the brakes on that person's truck repaired. After that truck was taken for a drive to test the brakes, John Ferguson said he heard some shots – he could not tell if it was gunshots or crackers coming from the back road to Ferguson Street. At that point, John Ferguson was down the road from Calvin Pinder's house which is situate at Ferguson Street.

11. After it got quiet, John Ferguson said he stepped back to the side of the road and a couple of seconds or minutes later, he noticed a person coming jogging through in a camouflage outfit with a machine gun in his hand – it was a full camouflage outfit except the hat. He said the camouflage was like what the police and defence force use – camouflage with green.

12. As the man with the gun was walking on Ferguson Street, there was a car parked near where the witness John Ferguson was standing; music was playing in that car so the man with the gun went to it and knocked on the window and tried to open the door/s but was unable to do so. The man stood in the light of the spotlight from Trevor Vincent's yard and a street light for approximately 15 to 30 seconds at a distance of approximately 5 to 6 feet away from him, at which time John Ferguson said he was able to see his face. Ferguson described the man with the gun as approximately 5' 9" to 6' 0", light skinned, bearded, with bushy hair and wearing glasses. He

then continued walking towards Calvin Pinder's house after which he heard gunshots being fired. Subsequently, he said he saw the appellant walking towards a black jeep (Escalade); the appellant, he said, got into the rear of that vehicle and it drove off towards Bernard Road. He, among others, telephoned the police after they had gone into Calvin Pinder's house and found the deceased in the chair with the television remote control still in his hand.

13. In answer to questions from the learned judge, John Ferguson estimated the distances between where the lights were and where the man with the gun was firing it as 100' and the distance from Calvin Pinder's house when the man was in the street before or at the time of shooting as approximately 50'.

14. John Ferguson did not know the appellant's last name even though he said that he had known him for a number of years before the 15 January, 2003.

15. After the incident, John Ferguson along with other persons went into Calvin Pinder's house where they found two younger children who were physically unharmed, and the deceased. They took the younger children out of the house and notified Calvin Pinder as well as the police.

16. Police Constables 1057 Kendal Hepburn and 1019 Rico Brown were on mobile patrol on 15 January, 2003, at 8.00 p. m., when they received information from the police control room. As a result, they went to Ferguson Street, Fox Hill. There they met a number of persons in the road; they were given information, and they secured the scene with scenes of crime tape. They later handed over to the scenes of crime officers.

17. Constable Carson Lundy said that between 8.45 and 8.50 p.m. on 15 January, 2003, he arrested the appellant on the Sir Milo Butler Highway in the Carmichael Road area.

18. The appellant's defence at trial was an alibi. He said that at the time when the shooting occurred, he was at a bar on Carmichael Road and he called Nicholas Williams to support that defence. Williams' evidence, however, appeared to undermine the appellant's defence of alibi in that Williams testified that the appellant had only been in the bar a few seconds before he left. It is clear from the evidence of Carson Lundy that the appellant was arrested shortly after leaving that bar.

The Appeal:

19. We shall deal first with ground 2 of the appellant's grounds of appeal since identification was one of the main issues in the trial.

20. In that regard, we note that at the very outset of the trial, the learned trial judge asked defence counsel, Mr Wayne Watson, the appellant's brother, if identification was an issue in the trial and counsel replied "No". The learned judge asked the same question later in the trial and received the same answer. The learned judge, nevertheless, correctly and fairly, in our judgment, required the prosecution to lay the proper evidential basis before allowing the prosecution to ask their witnesses to identify the person who fired the shots and whom they called "Roger" and "Double R" in court.

21. In addition, in a very careful summing-up, the learned trial judge gave impeccable Turnbull directions on the issue of visual

identification of the appellant by Trevor Vincent and John Ferguson. Beginning at page 487 and ending on page 492 of the transcript of the summing-up in the case, the learned judge gave the jury clear and detailed directions on how they were to deal with the evidence of visual identification in the case. It is sufficient, we think, to reproduce that portion of the summing up which begins on page 487, line 18, and ends at page 488, line 13. There the learned judge in dealing with the issue of the visual identification of the appellant by Trevor Vincent and John Ferguson, directed the jury as follows:

> "But if you are satisfied so that you are sure that they have told you the truth, then you must further be satisfied that they are correct in the identification of the accused as the shooter and there is no possibility of a genuine mistake in the identification of the accused as the shooter. First of all, the question is, do I believe what they have told me? And if I believe what they have told me, am I satisfied that they are correct in the identification of the accused as the shooter.
>
> The case then against the accused depends wholly on the truthfulness of those witnesses and also on the correctness of their identification. I must therefore warn you of a special need for caution before convicting the accused in reliance on the correctness of the identification of Trevor Vincent and John Ferguson. The need for such warning is because it is possible for a mistaken witness to be a convincing one, and a number of convincing witnesses can be mistaken. Such mistakes have been made in the past. Now this is a case in which the witnesses allege that they knew the accused well. I must tell you, though, that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone he knows, mistakes in recognition of even close relatives and friends are sometimes made. You should therefore consider carefully the circumstances in which the identification by each witness came to be made..."

22. The learned judge went on to deal in detail with: (1) the length of time each of the identifying witnesses said that they had the appellant under observation; (2) in what light their respective observations were made; (3) was their observation impeded in any way; (4) how long elapsed between the original observation by the witnesses and the subsequent identification to the police; and (5) the weaknesses in the identification evidence, including the discrepancies in the evidence adduced on behalf of the prosecution.

23. It is submitted on behalf of the appellant, that the learned judge erred by not alerting the jury to the possibility of collusion between the identifying witnesses. That omission, it is contended, is a serious irregularity which affected the fairness of the trial. Our examination of the transcript of the trial shows that no questions were asked of any of the witnesses, including the identifying witnesses, as to whether or not they colluded or even discussed the identity of the alleged shooter following the incident or at all. There was, therefore, no factual basis for the learned judge to mention the possibility of collusion among them. Furthermore, to do so in the absence of any evidence to that effect would have amounted to inviting the jury to speculate.

24. In light of the learned judge's actual summing-up, we find no merit in that ground and, in so far as the appellant's appeal depends on that ground, it fails.

25. In ground three of the re-amended notice of appeal complaint is made of defence counsel's conduct of the trial. The basis of that complaint is that defence counsel at the trial was a brother of the

appellant whose emotions may have got in the way of his objectivity in defending the appellant at the trial. As an example of misconduct on the part of defence counsel at the trial, Mr Munroe pointed out that a witness was called by defence counsel to support the appellant's defence of alibi, but that witness was not interviewed by counsel before he was called to testify and in fact that witness gave evidence which undermined the defence of alibi and was in fact favourable to the prosecution.

26. It appears from the record that the learned judge, quite rightly, in our judgment, in the absence of the jury, raised the issue of his objectivity with defence counsel. However, the choice of counsel is a matter for an accused person or civil litigant and the appellant never asked for his brother to be removed as his counsel from his defence nor is there any evidence that his brother did not consult the appellant before calling the witness, Mr Williams. Further, it is not suggested that the appellant objected to Mr Williams being called as a witness and that his counsel nevertheless decided to call him.

27. In cases where it is intended to rely on the incompetence of defence counsel as a ground of appeal, that counsel should be apprised of the complaint and the grounds thereof. In this case, that is not possible for the appellant's defence counsel at the trial has since died.

28. The issue of alleged misconduct by counsel during a criminal trial has been considered by the Court of Appeal in England as well as this court.

29. The first case to which I wish to refer, in which a similar complaint was made about the conduct of defence counsel in a

criminal trial is R v Christopher Irwin (1987) 85 Cr App R 294. In that case, Irwin was charged with criminal damage. He served notice of alibi witnesses and at his trial the witnesses were called but the jury were unable to agree and a re-trial was ordered. At the re-trial Irwin's counsel decided, without consulting him, not to call the alibi witnesses and Irwin was convicted. Irwin's appeal against conviction was allowed since under paragraph 156(a) of the Code of Conduct for the Bar of England and Wales, where the decision to call evidence was the client's, Irwin's counsel should have obtained from him clear, preferably written, instructions before deciding not to call the alibi witnesses. The Court of Appeal in England (Lord Justice Watkins, Mr Justice Michael Davies and Mr Justice Owen) held that there had been a material irregularity at the re-trial within section 2(1)(c) of the Criminal Appeal Act 1968, rendering Irwin's conviction unsatisfactory within section 2(1)(a). Accordingly, the conviction was quashed. See also R v Maxie Angus Anderson Ensor (1989) 89 Cr App R 139, R v Dean Clinton (1993) 97 Cr App R 320.

30. In R v Gautam [1988] Crim. L. R. 109, Gautam's appeal against his conviction for theft from a bookshop where counsel decided, after consultation with him, not to call medical evidence to show that he was on medication for migraine and that the drugs might have had an effect on him at the time of the alleged theft, was dismissed by the Court of Appeal in England. The court distinguished the case of Irwin.

31. Then in R v Swain (Note) [1988] Crim. L. R. 109, O'Connor LJ in giving the judgment of the court dismissing Swain's appeal, stated that if the court had had a lurking doubt that Swain might have

suffered some injustice as a result of "flagrantly incompetent advocacy" by his advocate, it would have quashed the conviction.

32. In the case of Anatole Bernard McQuay v Regina (Criminal Appeal No. 25 of 1996) Bahamas Court of Appeal (Unreported), the appellant first raised the issue of the competency of counsel on a petition to the Privy Council for leave to appeal some two years after this court had dismissed his appeal against his conviction for the murder of Gurth Dean and attempted armed robbery of Melodia Williams, the cashier at Sannay Meats following a retrial on those charges. At the retrial he was represented by Mr David C. Bethell, an astute and experienced lawyer of many years' standing, who died before the appellant petitioned the Privy Council for special leave to appeal on the ground of the incompetency of counsel. On an order made on 15 March, 2000, the Privy Council remitted his case to this court for this court to consider the issue of the conduct of defence counsel during the retrial, among other things. In the judgment handed down on 23 January, 2002, the court concluded that there was no merit in any of the grounds alleged against counsel in the appellant's petition except for the one which alleged that objection ought to have been made before the witness, Mr Barry, in that case, was allowed to make a dock identification of the appellant. In light of the evidence of the other identifying witnesses in the case, the court dismissed McQuay's appeal against his conviction. See also Bethel v The State (Privy Council Appeal No. 51 of 1998)

33. In this case there is no evidence to show that what the late Mr Watson did was done without the appellant's foreknowledge and informed consent. In the circumstances, that ground fails.

34. The first ground of appeal alleges, among other things, a misdirection by the learned judge on the issue of the requisite intention for murder. Under section 290 of the Penal Code (Ch. 84) ("the Penal Code"), the requisite intention for murder is an intention to kill – see for example Ferguson v Regina (1965-70) 1 LRB 129 at page 131 where Sinclair, P, in giving the judgment of the court said: "It will be noted that in the Bahamas an intent to kill is an essential element of both murder and attempted murder." Where a person does an act which, had he used reasonable caution and observation it would have appeared to him that his act would cause or probably cause a particular effect, then he is presumed to have intended to cause that effect.

35. In The Bahamas, unlike England and some other countries, the specific intention required to be proved in law is the intention to kill; any other intention – such as an intention to cause grievous bodily harm or recklessness as to whether death will be caused – is not sufficient. See, for example James Dean v Regina [1989-90] 1 LRB 534. Now, it is correct that section 12(3) of the Penal Code (Ch. 84) provides –

> "If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event or that there would be **great risk** of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event." (Emphasis added)

36. At first glance the use of the phrase "great risk" in that subsection would appear to mean that if a person does a voluntary

act either with the intention of causing an event or knows that there is a great risk - in other words, is grossly reckless as to whether that voluntary act would cause that event - is to be presumed by the tribunal of fact to have intended to cause that event. Whether the act was intended to cause the event it in fact caused, must depend on the evidence of the circumstances in which the act took place.

37. For example, if a person, armed with a loaded pistol fires it into a crowd of persons whom he can see, whether or not he intends to shoot a particular person in the crowd and someone in that crowd is in fact killed, he cannot be heard to say that he did not intend to kill the person who was in fact killed but rather someone else since he would have been clearly reckless and uncaring whether he killed his target or anyone else who may have gotten in the way of the bullet. The doctrine of transferred malice would apply in such a case – see the example at "Subs.(3)" to section 12(3) of the Penal Code. Where, however, there is no evidence that the person in a situation such as that disclosed in the evidence in this case fires at a house which may or may not appear to be empty to a reasonable person, it does not follow that an intention to kill is to be presumed, although it may do so if there is evidence to show that a reasonable person observing the house would have appreciated that someone was in the house. It is for the prosecution to adduce evidence to show that the circumstances were such that a reasonable person would have apprehended that someone was in the house at that hour of the night. There is no general or judicial presumption applicable to a particular family as to how they organise their private lives. In fact, in this case, the neighbours did not appreciate that three children were in that

house that night until after the shooting had occurred. It is not for an accused person to show that he knew or thought the house was empty. In fact, because the appellant's main line of defence was that he did not do the shooting, he could hardly be expected to undermine his own defence by saying, I thought the house was empty and I only meant to scare the adult/s who lived there.

38. In this case, the learned trial judge, following the very words of the subsection, referred to the "great risk" of harm and death being caused by the voluntary actions of the person who fired into the wooden house with a high powered rifle and high-velocity bullets on that fateful night. The difficulty in this case is that there is no evidence that the appellant knew or even must have known that the deceased or the other two children, or his intended target whomever it might be, were in that house that night. While there is some evidence to suggest that he may have known where the owner of the house worked and his hours of work, there is no evidence that he knew that anyone was in the house that night although he probably could be taken to have known that it was a house in which human beings lived and slept. Since the owner was not at home that night and there is no evidence that the appellant knew or if he used reasonable caution and observation ought to have known that someone was in the house that night - for example, if lights were on inside the house which would have alerted a reasonable person to the fact that someone was probably in the house, all that could reasonably inferred is that the appellant was reckless ("there was a great risk' means the same thing) as to whether anyone was at home or not and that cannot be equated to shooting into a crowd which the shooter can see. Those

witnesses who were asked about the outward appearance of the house said that there was only a little light on over the front door and that the deceased was in an inner room when he was killed, watching the television. There is no evidence that the light from the television set could be seen outside the house or that movements within the house could have been observed through a window or door. We therefore cannot say that we are satisfied that the direction on intention given by the learned judge, though it follows the words in the statute were adequate in the circumstances of this particular case firstly because there is no evidence that anyone was at home; and secondly, because it presupposes actual or constructive knowledge in the appellant of the presence of human beings in the house at the time of the shooting when in fact there is no evidence as to that nor could such knowledge be presumed without evidence. In her direction on that issue, the learned judge did not refer to any evidence from which knowledge in the person could be inferred. It seems clear to us that there can be no public knowledge of the specific habits of individuals in their private lives and inferences can only be reasonably and legally drawn from proven facts. In addition, the direction appears to indicate that recklessness as to whether death occurs or not is sufficient to support a guilty verdict for murder in The Bahamas. In those circumstances the direction would be a misdirection.

39. In his dissenting judgment, Justice Longley refers to the case of Farquharson v The Queen [1973] AC 786 in support of his conclusion that the learned judge's direction in this case on intention was within the ambit of subsection 12(3) of the Penal Code. Farquharson v The

Queen [1973] AC 786 was a case of joint criminal responsibility for murder where one or more of the persons involved in the commission of that offence may not have been armed and did not personally commit the act which resulted in death but where the person killed was clearly in the view of the shooter as well as his accomplices. In that case, Farquharson, who was unarmed, together with two other men who were armed, one with a cutlass, the other with a pistol, broke into a dwelling house at night with the object of theft. The inhabitants of the house were disturbed and one of the Farquharson's associates shot and killed the householder. Farquharson did not by his own hand do any unlawful harm to the deceased. The three men were charged jointly with murder contrary to what was then section 337 of the Penal Code. In summing up, the trial judge in that case directed the jury that if they were satisfied that the three accused had combined to effect a common object, to break and enter the dwelling house, and that common design included the use of whatever force was necessary to achieve that object, including their escape if resisted, even if that force involved killing or doing grievous harm, then if one of them in pursuance of that common design used such force with fatal results, they were each and all responsible for the consequences. The jury returned a verdict of guilty of murder against all three accused. The appellant appealed to the Court of Appeal against his conviction on the ground, among others, that the Penal Code did not create the offence of murder by two or more persons being concerned together and the common law principle of joint responsibility for acts done in pursuance of a common design did not obtain under the law of The Bahamas. The Court of Appeal

dismissed Farquharson's appeal and his subsequent appeal by special leave to the Judicial Committee was also dismissed.

40. At page 796 of the judgment in Farquharson's case, Lord Kilbrandon stated the principle thus:

> **"The basis of murder, as defined by section [336] of the Penal Code, is 'intentionally' causing the death of another. Provisions as to the meaning of 'intent' are, as has been pointed out, made by section 12 of the Penal Code of which subsection (3) reads as follows:.." (Emphasis added)**

His Lordship then quoted the words of subsection 12(3) of the Penal Code which we have set out at paragraph 35 above. He then continued –

> **"A man's intent can only be gathered from his acts, including his words. If a man uses reckless violence which may cause death, such as discharging a fire-arm at close range, and death ensues, then it may inferred, in the absence of any indication to the contrary, that if he had used reasonable caution and observation, it would have appeared to him that the discharge would probably cause the death. If such an inference be drawn, the man is to be presumed to have intended to cause the death, unless it be shown that he believed the shot would probably not cause the death,..." (Emphasis added)**

Of course in that case, the person who fired the shot as well as Farquharson, would have been able to see that there were human beings in that room. Here, there is no evidence that it was apparent that anyone was at home in the house at that time.

41. Beginning at page 496, line 7 to page 498, line 6 of the transcript, the learned judge in this case, directed the jury as follows:

> "Now if you are satisfied so that you are sure that the

accused was the person who fired into that home and if you accept the evidence of the firearms examiner about the powerful bullets and the evidence of Dr. Raju about the high-velocity bullets and the kind of injury that it causes, and if you are satisfied that building was a wooden building used as a home, and if you are satisfied that had the accused, that is, if you accept that he was the person, had he used reasonable caution and observation, it would have appeared to him that night that the building into which he was firing was a home and if you are satisfied that had he used reasonable caution and observation, it would have appeared to him that at 8:00 p.m., on a weeknight someone was in that home or **there was a great risk that someone was in that home** at the time he fired the bullets into the home, and if you are satisfied that had he used reasonable caution and observation it would appear to him that someone inside would be killed **or there was a great risk that someone would be killed by his firing high-velocity bullets** from a powerful rifle into that home, into a wooden house, then the law says that he is presumed to have intended to kill the person who died when he fired those shots, notwithstanding that you may find that the bullets may not have been intended or meant for the person who actually died. It is what we call transferred intention.

For instance, if you fired, like I said earlier, you fired a bullet into a crowd intending perhaps to hit somebody else but another person is killed, the law says that unless you can show on a balance of probabilities that you did not believe that what you did would have caused death, then you are presumed to have intended what happened in those circumstances. It does not matter that he did not intend to kill or he did not mean to kill Eddison Curtis-Johnson. But if he fired into that home with that kind of rifle, with that kind of bullet, and killed Eddison Curtis-Johnson, the law says that he is presumed to have intended to kill the person who was in fact killed unless he can show that he had – that he reasonably believed that his actions would not cause that event.

At the end of the day, the question is whether in all of the circumstances that you find you are satisfied so that you are

sure that the accused fired into that house and when he did so, he intended to kill somebody therein. And as I indicated to you, section 12(3) will assist you in making that determination.

Now, of course, if you believe that he did fire into that house, into that home but you are not sure that he intended to kill anyone therein but only to harm, then he would be guilty only of manslaughter. But the question for you is, if a reasonable man stands 50 feet from a wooden house with a high-powered rifle with high-velocity bullets and fires a gun into a dwelling house, then what else, you may think, could have been that person's intention but to kill someone therein?

But it's a question at the end of the day given all of the circumstances that you accept whether that person had an intention to kill someone in that home when he fired that shot or shots, or whether he intended by his actions only to harm somebody and in that case it would be manslaughter." (Emphasis supplied).

42. In that regard, we note that in James Dean v Regina [1989 -90] 1 LRB 534, this court – differently constituted – decided that on a charge of murder, recklessness is not an alternative to finding an intention to kill. At page 538, Henry P, in delivering the judgment of the court said:

> "We are not satisfied that the learned trial judge was speaking of recklessness in the context of determining whether the appellant had an intention to kill. It seems to us that in saying 'In either event' the learned trial judge could at least be understood as suggesting that as an alternative to finding an intention to kill the jury could **if they concluded that the appellant was merely reckless or uncaring, find that this was sufficient to satisfy the necessary intention for murder. This would be a misdirection**..." (Emphasis supplied)

In Dean's case, the court applied the proviso to section 13 (1) of the Court of Appeal Act (Ch. 53) because it concluded that on the facts of

that case if the jury had been properly directed on the specific intention for murder, they would inevitably convicted since the accused had shot the deceased twice in the chest from a distance of six inches.

43. In their judgment in Philip Joshua Rahming v The Queen (Privy Council Appeal No. 33 of 2001) delivered 20th May 2002, at paragraph 16 on page 11, their Lordships stated:

> "... The second aspect is that the judge, in dealing with the effect of section 11(3), refers twice to 'reckless violence which may cause death'. This language and other parts of the passages which their Lordships have quoted would leave the jury with the impression that a reckless killing would suffice in law for the commission of the crime of murder. As was pointed out in Dean v R...any murder direction which suggests that a reckless killing suffices is a misdirection. The judge came back to the same point late in his summing-up (at page 461 of the record) and said in relation to murder: 'There must be an intention to kill **or** somebody uses reckless violence which they understand could cause death and knowing that it would [sic] cause death they went ahead and used it'... This again suggested that the use of reckless violence suffices as an alternative to an intentional killing.

44. Although as Justice Longley points out, in both Dean and Rahming's cases, the word "reckless" was used in directing the jury on the necessary intent for murder, and the Privy Council used the phrase "reckless violence" in Farquharson's case, in Rahming's case, their Lordships continued at paragraph 17 on page 11 –

> "17. In their Lordships' opinion these directions on the crime of murder risked a confusion in the minds of the jury between the ingredients of the crime of murder and that of manslaughter and risked the jury returning a verdict of guilty of murder when they were only satisfied that the killing must have been reckless and ought to have returned a verdict of guilty of manslaughter."

In both of those cases, there was clear evidence of the accused persons being able to see the persons who were in fact killed; in other words, in neither of them was there any appearance of a home with no one in it at the time. Furthermore, the fact that the learned judge equated the circumstance of firing into a crowd with the situation that obtained on that night at that house was in our view clearly a misdirection on the evidence because there was no evidence that anyone, was in that house at the material time that night.

42. In this case, there is no evidence that the appellant (or whoever the shooter was) knew, or must have known that someone was in that house that night. In this society, it is not unusual to find a home with a small light burning in front of the front door of the house but with no one in the house or at home. In the circumstances, we are unable to find any factual basis to support the direction that the appellant must have known that someone was at home in that house at that time. Therefore, when the learned judge directed the jury - "...if you are satisfied that had he used reasonable caution and observation, it would have appeared to him that night that the building into which he was firing was a home and if you are satisfied that had he used reasonable caution and observation, it would have appeared to him that at 8:00 p.m., on a weeknight someone was in that home or there was a great risk that someone was in that home at the time he fired the bullets into the home..." is based on assumptions for which there was no evidential basis in the case.

43. The jury must have been confused into believing that recklessness in not caring whether or not someone was in the building was sufficient in The Bahamas to found a conviction for murder instead of manslaughter. In our view this was a misdirection.

44. In light of the decision of this court in Dean v Regina and of the Privy Council in Philip Joshua Rahming v Regina, cited above, we hold that those directions by the learned trial judge were misdirections which undermine the integrity of the conviction for murder.

45. For the reasons given, we would allow the appeal, quash the conviction for murder, set aside the death penalty; and substitute therefor a conviction for manslaughter and impose a sentence of fifty years' imprisonment with effect from the date of conviction because in our judgment on the scale of manslaughter, this offence stands at the top end.

46. We do not consider it necessary to deal with any of the other grounds of appeal other than to say that we find no merit in any of them.

Rt, Hon. Dame Sawyer, P

The Hon. Mr Justice E. E. Osadebay, JA

Dissenting Judgment of Longley J.A.

1. It is only in relation to ground 1 of the appeal that I regretfully differ from the majority and I do so for the reasons that follow.

2. In 1899 a politically charged controversy developed over the use by the British of the 'mark iv hollow-point' bullet, commonly known as the Dum Dum, named after the place in India where the British first developed a similar missile.

3. The controversy took root at The Hague peace Conference in 1899 as a result of which Declaration iii, among others were adopted by the convention, the effect of which was to outlaw or ban the use in warfare of the Dum Dum or bullets which expand or flatten easily in the human body. It was the inhumane and deadly nature of the effects of such bullets that drove the controversy. However, the British maintained, not without some justification, that they were being singled out when other nations had developed similar ammunition.

4. In this case forensic evidence was given of the type of bullet used and its effect on the human body. It bears remarkable similarity to the Dum Dum .It was described as a bullet that was designed to penetrate objects and expand on contact with the human body so as

to cause the maximum damage, which usually resulted in death. The resulting injury to the little boy in this case not only bears out that description but it was so horrific and extensive, as photographs 56 and 57 of the photo album reveal, that the forensic pathologist was unable to determine if the damage was caused by one or two bullets.

5. By any objective standard the use of the bullets in this case can only be described as deadly force. And taking into account the following facts and circumstances-(1) that the appellant fired 9 or more such bullets at mid level to the door of the house (2) that when he fired the fatal shots he knew he was firing into a dwelling home where a family dwelt (3) that he fired the shots from a distance of fifty feet using a weapon with a range of at least a mile (4) that the shooter may have been motivated by revenge against persons who either lived in the home or frequented it (5) the shots were fired between 7:45pm and 8pm on a weeknight - the only reasonable inference to draw from those circumstances, in my judgment, is that who ever fired those shots intended to kill,(for the purposes of the crime of murder), anyone at home at the time. It was not mere chance that the boy was at home at the time. He lived there. He was undoubtedly, one of the occupants expected to be home at that hour.

6. And so it seems to me that even if the majority is right in concluding that there was a misdirection in this case on the question of intention or the mens rea for murder, I still would not disturb the verdict reached by the jury because, in my judgment, a jury properly directed in the circumstances would still have come to the same conclusion that the shooter had the requisite mens rea for murder.

That is because in the circumstances the prosecution would have been entitled to rely upon the evidential presumption contained in section 12 (3) of the Penal Code, and infer the necessary mens rea for murder, i.e. an intention to kill. That section provides as follows: (3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event.

7. It must not be forgotten that in this case the question of an intention to kill was not put in issue by the defence. The defence was an alibi. And so to my mind once there were circumstances, which

allowed for the drawing of an inference that the shooter must have intended to kill, the jury were entitled to find that whoever shot the bullets intended to kill in the absence of any evidence that he did not intend to do so.

8. Ground 1 was not fully developed but as I understood it the appellant was alleging that either there was a misdirection on the mens rea for murder, i.e. intention to kill, or there was no evidence to support the mens rea because there was no evidence that at the time the appellant fired the fatal shots he knew that anybody was at home.

9. It seems to me that for the purposes of section 12(3) of the penal code and in the circumstances of this case, the question is not whether the appellant knew that someone was at home when he fired the fatal shots that killed the deceased,(as posed by the majority), but rather the question is whether, when he fired the fatal shots did he know that there was no one in the home or had he taken reasonable steps('reasonable caution' to use the words of the Statute) to ascertain that there was no one at home before he started firing the fatal shots, which forensically were able to penetrate the clapboard house with deadly force.

10. Section 12(3) makes clear that for one to take advantage of the proviso he must have used **reasonable caution and observation** before doing the act that caused the result under examination. So unless there is evidence which itself calls into question the applicability of the presumption of an intention to kill, the accused must himself put the issue before the court. In the absence of such evidence the jury were entitled to find by relying on section 12(3) that he possessed the prerequisite mens rea for murder at the time of the commission of the actus reus.

11. In other words, it seems to me that the section places the evidential onus upon the appellant to disprove the presumed intention that represents the natural and probable consequences of his acts by showing that he used reasonable caution and observation to avoid the consequences that flowed from his act or by showing that he believed the act would not cause or contribute to cause the event. It is not simply a question of what he was able to observe. For one may turn a blind eye to that which may be easily ascertainable using reasonable precaution. In this case there is no evidential basis for concluding either that the burden was discharged or that on the prosecution's case the presumption was rebutted.

12. Section 12 (3) of the Penal Code introduces a civilized standard of responsibility for one's acts. And so a man standing on the roof of a house cannot, without looking to see if there is anyone below, throw a heavy beam or an anvil from the roof that kills someone below and claim that he is not guilty of murder because he did not know the person was there.(see Smith and Hogan Criminal Law 2nd Edition page 199 and Desmond Barrett(1868) the Times,April 28)

13. If he had used reasonable caution and observation he would have ascertained that not only was it unsafe to do what he did, but that there was a great risk that his act would cause death of any passerby below. The presumption is rebuttable, however, and therefore avoids the rigours and criticisms that Smith v DPP [1961] A.C. 290 evoked. (see also Ferguson v R (1965-70) 1 LRB 129.)

14. In the same vein in my judgment a man cannot direct deadly force at a dwelling home killing a member of the family he knows dwells there and then be heard to say he is not guilty of murder because he did not know anyone was at home at the time, when by using reasonable caution and observation he would have discovered the truth, that in fact there were several persons at home at the time and that having regard to the deadly force he was intent on using,

there was a great risk that someone would be killed. Significantly, Trevor Vincent testified that after the shooting he went to the house and knocked on the front door and the younger sister of the boy who was killed and who was at home at the time and who was unharmed opened the door. By taking the necessary precautions, the appellant too could have discovered the truth.

15. A defense that the appellant was ignorant was not raised and in my judgment ignorance as to whether someone was at home, even if that was indeed the case, could not avail the appellant. Section 96(1) of the Penal Code provides that ignorance or mistake of fact only avails a man if, in good faith, he does an act he believes to be lawful. Riddling a dwelling home with deadly bullets is not on any account a lawful act.

16. In any event, I am satisfied that even if there was a misdirection, and I do not agree that there was a misdirection, no miscarriage of justice occurred because, in my judgment, a properly directed jury on the facts of this case would inevitably have come to the same verdict.

17. But was there misdirection? Two cases are cited to support the position taken by the majority. They are Rahming v R (UKPC no.

33/01) (Rahming) a decision of the Privy Council (PC) and Dean v R [1989] 1 LRB 534 (Dean), a local decision of the Court of Appeal. The view of the majority is that the use by the learned judge of the term 'a great risk' in her summing up, which words are taken directly from section 12(3), the learned judge misdirected the jury on the mens rea because the use of those words left open the possibility the jury would think recklessness and not an intention to kill was the mens rea for murder.

18. I cannot agree for several reasons. First, a summing-up using the words of the section has always been regarded as proper. None of the cases to which the majority refers refutes that or may be regarded as an authority for the proposition, which is advanced. It would follow that judges in the future would have to omit the use of the words 'a great risk' found in the section whenever they sum up for murder, lest they be thought to have misdirected the jury on the correct mens rea for murder by conveying the impression that recklessness is the mens rea for murder. Neither Rahming nor Dean makes that point. In fact in Rahming the Privy Council held that the prosecution could rely upon the provision of section 12(3) to establish the mental element of an intention to kill, and they did not

express any reservation regarding the words 'a great risk' found in the section. And nothing in the section, in my judgment, justifies that interpretation.

19. Second, it is clear that neither in Rahming nor Dean which was referred to by the Privy Council in Rahming was any reference made to Farquharson v R[1973] A.C 786 (Farquharson), an earlier decision of the PC. In Farquharson the PC while reaffirming that the mens rea for murder was an intention to kill, specifically said in relation to section 12(3) 'that a man uses **reckless violence** which may cause death, such as discharging a firearm at close range and death ensues, then it may be inferred, in the absence of any indication to the contrary, that if he had used reasonable caution and observation, it would have appeared to him that the discharge would probably cause the death.' If such an inference be drawn, the man is to be presumed to have intended the death of the deceased, in the sense in which the meaning of 'intent' is explained in section 12(3). A proper direction on intent, together with a quotation from section 12(3) was given by the trial judge at the conclusion of the summing up.'(emphasis mine)

20. The Privy Council in Farquharson clearly approved the use of the term 'reckless violence' in the context of a direction under section 12(3) and also specifically approved quoting from the section, without any qualification, while reaffirming that the mens rea for murder was an intention to kill.

21. Third, the learned judge never used the word reckless in the context of her directions to the jury on the mens rea for murder. In fact she did not use the word at all. So it is difficult understand how the jury would think that recklessness was the appropriate mental element for murder.

22. Fourth, I have read the summing up and it is clear that throughout it the learned judge repeatedly makes clear that the prerequisite mental element was an intention to kill and that the jury had to find such an intention on the part of the shooter before convicting the appellant of the offence murder.

23. A consideration of Rahming is appropriate at this point. The case it seems to me turned on the judge's direction to the jury. That was a case where, unlike the present case, murder and manslaughter were left to the jury and so the question of the mental element was directly in issue on the facts of the case. The learned judge

(Osadebay J. as he the was) did not in the judgment of the Privy Council make clear to the jury the distinction between an intention to cause death,(the mens rea for murder), and an intention to cause harm (the mens rea for manslaughter). And so since the jury convicted of murder when they may have been confused about the mens rea for one offence as opposed to the other, the PC set aside the verdict on murder and substituted a conviction for manslaughter. That in my judgment is the ratio of that case.

24. In view of the fact that the learned judge used the word 'recklessness' in the course of his summing up, the court pointed out that in Dean the Court of Appeal of The Bahamas had made clear that recklessness was not the mens rea for murder.

25. However, it should be pointed out that in Dean, notwithstanding that the court thought a misdirection may have occurred by the use of the word 'reckless' in the summing up, it still dismissed the appeal as on the facts the court felt the jury would inevitably have convicted of murder.

26. The learned judge in this case in my view properly summed up the law on the mens rea for murder in my judgment and I can find no deficiency in the evidence. The appellant fired a high-powered rifle

with a range of more than a mile at close range (50 ft) and loaded with deadly weaponry into a clapboard dwelling house at between 7:45p.m. and 8:00 p.m. on a weeknight where he knew persons resided. The shots-9 or more of them- were fired at a height which demonstrated that he intended within the meaning of section 12 to hit anyone who was probably at home. The picture of the deceased with the remote control in his hand with his head leaning over from the gunshot wound or wounds, indicates that not only was he at home at the time (along with younger siblings) but more than likely was watching TV at the time the fatal shots were fired, a fact which would have been obvious to anyone using reasonable caution and observation to ascertain that no one was at home before firing the shots. Trevor Vincent who went to the house almost immediately after the shooting testified that the deceased was watching television.

27. For these reasons I would therefore have also dismissed Ground 1, in addition to the other grounds. It is the only ground the disposition of which I reluctantly disagree with the majority.

28. I would therefore dismiss the appeal as I can find no error in the summing up.

29. On the question of the sentence, this case is at the high end of the scale. The only reason no one else was killed was a matter of pure chance.

The Hon. Mr. Justice Longley, JA