

(1) Dalton Daley and (2) Milton Montique

Appellants

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 8th December 1997

Present at the hearing:-

Lord Goff of Chieveley
Lord Griffiths
Lord Cooke of Thorndon
Lord Hope of Craighead
Mr. Justice Gault

[Delivered by Lord Hope of Craighead]

The appellants in this appeal from the Court of Appeal of Jamaica were charged and convicted on an indictment which, as amended, contained three counts of capital murder. These were that they murdered Delores Campbell on 18th March 1992, that they murdered Juliet Martin on 18th or 19th March 1992 and that they murdered Andrew Blake between 18th March and 7th April 1992. The terms of the indictment reflected the fact that the victims died of their wounds on different dates. They had however all been shot in the course of a single incident. The case for the Crown was that the murders were committed in the course or furtherance of an act of terrorism, and that each of the defendants was guilty of the capital murder of all three victims because they had either caused their deaths by their own act or had themselves used violence on the victims in the course or furtherance of the attack on each of them.

This approach to the classification of the defendants' offences as capital murder was based on the provisions of the Offences Against the Person Act 1868 ("the Principal Act") as amended by the Offences Against the Person (Amendment) Act 1992, by which murder in Jamaica is categorised as either capital or non-capital murder. Section 2(1) of the Principal Act, as amended, specifies the categories of capital murder, among which there has been included murder in the course or furtherance of an act of terrorism. This is provided for in section 2(1)(f), which is in these terms:-

"Any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public."

In this case, as the Crown sought to prove that each of the defendants was guilty of all three murders, the provisions of section 2(2) of the Principal Act as amended are also relevant. This subsection provides:-

"If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

Mention must also be made of section 3(1A) of the Principal Act as amended, which provides:-

"Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has -

- (a) whether before or after the date of commencement of the Offences against the Person (Amendment) Act 1992, been convicted in Jamaica of another murder done on a different occasion; or
- (b) been convicted of another murder done on the same occasion."

Section 3B(5), which it is not necessary to quote here, provides that a person is not to be sentenced to death by reason of a previous conviction for murder unless he has been given notice before the trial that it is intended to prove the previous conviction and before he is sentenced his previous conviction for murder is admitted by him or is found to be proven by trial judge. In *Simpson v. The Queen* [1997] A.C. 1 it was held that this requirement applies only in respect of a conviction at a previous trial, and that where two non-capital murders are the subject of convictions at a single trial no such notice is required. In this case all three murders were the subject of convictions at the same trial, and no issue now arises as to whether each of the defendants was guilty of all three murders. The grant of special leave to appeal to their Lordships' Board was expressly limited to the question whether there was any evidence to support the convictions of capital murder.

The evidence for the Crown at the trial was, briefly, to this effect. The victims were all killed in the course of a shooting incident on the night of 18th March 1992. It took place on the ground floor of a four storey apartment block at 9 Blunt Street in the Hannah Town area of Kingston. The mother of Juliet Martin, who was one of the victims, was Hyacinth Sterling who lived nearby in Oxford Street. At about 9.30 p.m. she looked through her window and saw five men standing in a circle talking to one another. They included the two defendants who were known to her. She saw that Montique had a gun in his hand which he was loading and then put in his pocket. The five men then left to go towards Blunt Street, from where about five minutes later she heard the sound of shots. They were next seen by an eye-witness to the incident named George Brown. He was at home in his apartment at 6 Blunt Street when, on looking through his window, he saw some men round the back of the building. He could make out three of them, including the two defendants, and he went out onto the step at the front of his house to see what was going on. People started to run, and he heard the words "Man a come". The three men then ran underneath the building, and he saw Daley fire a shot at a little boy who ran into Juliet Martin's house on the first floor. He was Andrew Blake, whose mother was Delores Campbell. According to a post-mortem report Andrew Blake was 16 years old. The door of her house was pushed closed from inside, but Daley kicked it open, pushed his hand inside and fired three shots into the

house. He then saw Montique stamping the door of another house with his foot. This was a house on the same floor of the same apartment block where Delores Campbell lived. Montique fired shots at the door of this house and then ran off with the other two men. The third man was Clive Burger, who also had a gun in his hand but was not said by George Brown to have fired any shots. After the incident was over Juliet Martin ran out of her house severely wounded and fell to the ground. She died later in hospital. Delores Campbell was already dead and Andrew Blake, who was also severely wounded, died a few days later from his injuries.

In cross-examination it was put to Hyacinth Sterling by Daley's counsel that Oxford Street was a PNP (Peoples National Party) area and that Blunt Street was a JLP (Jamaica Labour Party) area, and that there were frequent and regular shooting incidents between the two areas. She appears to have been reluctant to give clear answers to these questions. George Brown was more forthcoming when the same points were put to him by Daley's counsel, although he was unwilling to accept that there were regular shooting incidents or that there was gang warfare in that area between the PNP and the JLP. But their Lordships do not need to dwell on this point. In *Lamey v. The Queen* [1996] 1 W.L.R. 902 the Board rejected the argument that an act of terrorism within the meaning of section 2(1)(f) required to be an act done in pursuit of some political or ideological purpose. As Lord Jauncey of Tullichettle observed at page 904G, it appears that the mischief sought to be dealt with by the paragraph was the wanton killing of persons for the primary purpose of driving fear into the hearts of a particular community. Furthermore neither of the defendants gave any explanation for the incident in the statements which they made from the dock. Daley said that he was innocent and that he knew nothing of the murders. Montique said that he had an alibi as he was at home at the time, and that he also knew nothing of the incident.

The principal argument which Mr. Fitzgerald Q.C. advanced for the defendants was that the issue as to whether they were guilty of capital or non-capital murder had not been addressed properly at the trial by the trial judge. Although he also submitted that there was no case for them to answer on all or at least some of the charges of capital murder, his main point was that the trial judge had misdirected the jury about the meaning of section 2(1)(f) in

his summing up and that he had failed entirely to give them any directions at all about section 2(2) of the Act of 1868 as amended by the Act of 1992.

Section 2(1)(f).

In the passage in his summing up where he dealt with section 2(1)(f) the trial judge began by quoting the definition of the expression "an act of terrorism" which is set out in the paragraph, that is to say that it was an act involving the use of violence by each accused which by reason of its nature and extent was calculated to create a state of fear in the public. Then, after summarising the relevant evidence, he went on to say this:-

"In determining whether the use of violence is calculated to create fear, all the circumstances must be considered. Was there any evidence of motive suggesting political overtures or action based on political consideration? State of fear in the public or any section of the public must be interpreted by you, members of the jury, to mean - must not be interpreted, I beg your pardon, by you to mean that that fear can only be created in those who witnessed the violence. If you accept George Brown's evidence, you feel sure about it, then was the action on the part of the men excessive use of violence which created extreme fear in the minds of the citizenry in the Blunt Street, Oxford Street, Hannah Town area of Kingston on the night of the 18th of March, 1992?

You have to take a common sense approach as right thinking members of the public and say whether the community, the people who are said to have resided in the apartment - four storey buildings on Blunt Street and two storey buildings on Oxford Street and adjoining area, you are to say whether they would be affected by the action of the men as described by George Brown.

The test, members of the jury, is not whether the persons or person who viewed or witnessed the violence were put in fear but whether the act of that violence was calculated to serve as a warning to the public in general or section of it. If taking into account all the circumstance you were to conclude you are sure about it, that each accused man murdered

only one reasonable interpretation of it. Five men, some at least armed with guns, went into the Blunt Street area together at night. Their arrival caused fear and alarm in the community. A warning was shouted and people ran for shelter into their homes. A youth, who was offering no violence in return, was shot as he tried to escape. The defendants, acting more or less simultaneously, kicked at the doors of two separate apartments on the first floor of the same block and then fired shots indiscriminately into them before breaking off their attack. All the indications are that this was an act of wanton violence which was directed at the community in general and not against any particular individual or individuals. The fact that a mother, Delores Campbell, and her son, Andrew Blake, were both killed appears to have been a pure coincidence - just the kind of thing that is likely to happen if people are attacked in their own homes. There was some evidence that Delores Campbell was the niece of a woman who had been Montique's girlfriend, but there was nothing to suggest that this relationship had anything to do with the incident.

For these reasons their Lordships have come to the conclusion that Mr. Fitzgerald's submissions about the trial judge's directions on section 2(1)(f) are not well-founded, and that there are no grounds for saying that the jury were not entitled to convict the defendants of committing murder in the course or furtherance of an act of terrorism.

Section 2(2).

The background to this issue is simply this. Each of the defendants was found guilty of all three murders, either on the basis of his own act or on the basis of joint enterprise. The evidence showed that Daley shot Juliet Martin and Andrew Blake and that Montique shot Delores Campbell. There was no evidence that Daley fired any shots at Delores Campbell or that Montique fired any shots at Juliet Martin or Andrew Blake. In order to determine whether each of them was guilty of the capital murder of all three victims it was necessary for section 2(2) to be applied. It will be convenient to set out again what this subsection provides:-

"If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted

or attempted to inflict grievous harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

The trial judge overlooked this point entirely, because he gave no directions to the jury at all on this point. His directions assumed that the only question, in order to enable the jury to return a verdict of guilty of capital murder against each defendant on all three counts, was whether what they did was an act of terrorism. What he said was this:-

"If you were not so satisfied that what they did, what each did, was an act of terrorism but you were sure that each of them committed murder, murdered one or more of the persons named in the indictment as having been murdered, then it would be open to you to return a verdict of guilty against each accused in respect to each of the counts for which you are sure that the prosecution have proved all the material ingredients of the charge of murder; and by 'murder' I mean non-capital murder. That is to say, if you are not sure about it the prosecution fail to prove that what they did, each did, in murdering the particular deceased, was done in the course or furtherance of an act of terrorism, but you are sure that each accused or one or other accused murdered a particular deceased, then it would be open to you to return a verdict of guilty against that accused - guilty of the offence of non-capital murder."

Their Lordships are in no doubt that this was a misdirection. The effect of the passage was to tell the jury that all they needed to be satisfied about, in order to find each defendant guilty of capital murder, was that the murders were committed by them both in the course or furtherance of an act of terrorism as part of a joint enterprise. But that is not the test which section 2(2) lays down. What is required is that where two or more persons are guilty of any of the categories of murder referred to in subsection (1) - except that referred to in paragraph (e) - one or other of three additional tests must be satisfied before one or more of them can be found guilty of capital murder. These are (1) that the person by his own act caused the death of the person murdered; (2) that the person inflicted

or attempted to inflict grievous bodily harm on the person murdered; and (3) that the person himself used violence on the person murdered in the course or furtherance of an attack on that person. In this case the evidence was that Daley by his own act caused the deaths of Juliet Martin and Andrew Blake, so a verdict that he was guilty of the capital murder of these two victims was inevitable. And, as the evidence was that Montique by his own act caused the death of Delores Campbell, a verdict that he was guilty of her capital murder was inevitable in his case. But the jury found each of them guilty of the capital murder of all three victims. The question is whether, on a proper construction of section 2(2) and in light of the evidence, this was a miscarriage of justice.

The argument which Mr. Guthrie Q.C. presented for the Crown was that the third of the three tests in section 2(2) applied to this case. He said that the word "violence" could encompass more than touching the victim, and in particular that physical contact with the victim was not required. So a person who assists another person to cause the death of the victim by chasing him would be guilty of his capital murder, because he had used violence in the course or furtherance of the attack. As there was some evidence to suggest that both defendants had been involved in chasing the victims into their houses where they were shot, the test was satisfied in this case and, despite the absence of a direction by the trial judge, there was no injustice. In any event the Crown wished to have the guidance on this point which the Board had been unable to give in *Simpson v. The Queen* [1997] A.C. 1.

Their Lordships are unable to accept this argument. The phrase used in section 2(2) to describe the third test must be read as a whole and in context. The subsection was intended to limit the imposition of capital punishment. Its context is the case where two or more persons are guilty of the same murder, either because of their own act or on the principle of joint enterprise. Its purpose is to separate out those whose participation was on the principle of joint enterprise from those who must answer for their own acts by the imposition of the death penalty. The other two tests are concerned with the direct use by the person of violence on the victim - in the one case by his own act causing the death, in the other by inflicting or attempting to inflict on him grievous bodily harm. The words of the third test, "who himself used violence on that person", follow the same pattern. They indicate that here also some form of contact with the victim

is required. Merely to be acting in the course or furtherance of an attack is not enough. The words "on that person" suggest that the violence must not merely have been directed at the victim, as in the case of threats, but that it must have made some form of contact with him physically. To construe these words so widely as to include acts such as threatening or chasing the victim, albeit in the course or furtherance of the attack, would be to deprive the subsection of most, if not all, of its limiting effect. That cannot be what was meant when it was decided to include this third test.

As for the facts, the order of events as described by George Brown was that the people started to run as soon as the men appeared before any shots were fired. There was no evidence that any of the men chased any of the victims except for Daley who shot Andrew Blake as he was running into the house. At no stage was Daley said to have used any form of violence on Delores Campbell, whose death was caused solely by the actings of Montique. At no stage was Montique said to have used any form of violence on either Juliet Martin or Andrew Blake, whose deaths were caused entirely by the actings of Daley. The case as presented on the Crown evidence is a simple one. On a proper construction of section 2(2) Daley ought not to have been found guilty of the capital murder of Delores Campbell but only of her non-capital murder. And Montique ought not to have been found guilty of the capital murder of Juliet Martin and Andrew Blake but only of the non-capital murder of each of them.

Their Lordships wish to stress that it is necessary for the trial judge, in the case of each of the categories of murder referred to in subsection (1) of section 2 of the Principal Act as amended except that of the kind referred to in paragraph (e) of that subsection, where two or more persons are found guilty of the murder, to give a direction about the application to the case of section 2(2) of that Act. It is not enough in such a case to give directions as to whether or not the murder was committed in the circumstances which would make it capital murder as set out in subsection (1). The jury must reach a separate verdict for each defendant on the question whether the murder which he committed was capital murder or non-capital murder. That cannot be done without applying to his case the provisions of section 2(2).

Section 3(1A).

The only remaining question is the application to this case of the provisions of section 3(1A) of the Principal Act as amended. For the reasons given in this judgment their Lordships consider that Daley was guilty of the non-capital murder of Delores Campbell and that Montique was guilty of the non-capital murder of Juliet Martin and Andrew Blake. But they were each found guilty of three murders in the same trial. The trial judge would have been bound therefore to sentence them to death for the non-capital murders which they had committed. It would not have been open to him in this case to have sentenced them, in respect of these murders, to life imprisonment.

Their Lordships will therefore humbly advise Her Majesty that these appeals should be allowed to the extent only of substituting, in Daley's case, a verdict of non-capital murder for the jury's verdict of finding him guilty of the capital murder of Delores Campbell, and in Montique's case, verdicts of non-capital murder for the jury's verdicts of finding him guilty of the capital murders of Juliet Martin and Andrew Blake; and that they each should be sentenced to death for their non-capital murders in terms of section 3(1A) of the Offences Against the Person Act 1868 as amended.