Privy Council Appeal No. 53 of 1992

(1) Errol Dunkley and
(2) Beresford Robinson *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 27TH JULY 1994, DELIVERED THE 4TH OCTOBER 1994

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD BRIDGE OF HARWICH
LORD JAUNCEY OF TULLICHETTLE
LORD MUSTILL
LORD NOLAN

*[Delivered by **Lord Jauncey of Tullichettle**]*

The appellants were convicted of the murder of Orville Wright on 21st July 1988 in the Circuit Court Division of the Gun Court and sentenced to death. Their appeals to the Court of Appeal were dismissed on 16th November 1990 and they now appeal by special leave to the Board. At the conclusion of the hearing their Lordships indicated that they would humbly advise Her Majesty that the appeal of Dunkley should be allowed and that of Robinson dismissed and that they would give their reasons later. These reasons now follow.

The events leading up to the murder fell naturally into two stages:-

(1) At about 0300 hours on 16th January 1986 a number of men, one of whom was armed with a sub-machine gun, broke into a combined house and shop in Mountainside, Saint Elizabeth, where they stole various articles including a green barrel-bag and a bracelet belonging to one of the occupants, Sharon Rose.

Some youth back we up and one of them grab on Dunkley bag and Popsie fired some shots pon the youth and some other boys. The youth what grab on Dunkley drop, and me and my friend Youth run and later me no know what happen to youth.

Early in the morning me see a man and woman on the roadside and them tell me say a bus soon come fe go Town and me wait and take it. When me go pon the bus, me see Popsie, but me no talk to him. Him come off a Mandeville Square; lef him shoes, windbreaker and some other things. Me travel along pon the bus and police hold me in a the road block a Williamsfield. Signed Beresford Robinson, witness M ? date 19/1/86."

(2) When arrested at 0630 hours on 17th January 1986 he was found to be wet and muddy from the waist down but dry above and his explanation therefor to the arresting officer was that it had been raining. In an unsworn statement from the dock he repeated this explanation and claimed that he knew nothing about the robbery or the events in the morass.

(3) When arrested he was found to be wearing a bracelet which was identified by Sharon Rose as having been stolen from her during the robbery.

(4) He was also identified by Sharon Rose as being present at the robbery and at a second identification parade which she attended on 18th February 1986. There was also Rose's evidence that a green barrel-bag had been stolen from her during the robbery and evidence from Allwood that a bag of similar description was being carried by one of the four men in the morass.

Dunkley's appeal.

At the outset of the trial Dunkley and Robinson as well as a third accused, Williams, who was acquitted, were represented by counsel. However late in the afternoon of the first day of the trial Dunkley's counsel withdrew from the case in the following circumstances. A police inspector, Henry, was giving evidence about the circumstances in which Shenriff Smith had made his identification of Dunkley at an identification parade. It appeared from this evidence that Smith failed to identify Dunkley on his first sight of the parade but had returned to view the parade on a second occasion when he had made a positive identification. The Crown sought to produce the form which Smith had signed on the second occasion. Mr. Frater, for Dunkley, objected and the following interchange took place:-

"MR. FRATER: I am saying it is so obviously irregular to have two identification parades.

Q. Where did you conduct this identification parade?

HIS LORDSHIP: Mr. Dunkley -

ACCUSED DUNKLEY: Yes, sir?

HIS LORDSHIP: Your lawyer has abandoned you in the middle of the case. So the case having been started, from here on, you are on your own. You will have to defend yourself. I will give you every opportunity and give you every assistance that I can.

ACCUSED DUNKLEY: M'Lord, I am not capable of defending myself.

HIS LORDSHIP: That is not my problem. I can do nothing. You had a lawyer and he has abandoned you.

MR. McBEAN: Yes, inspector, on the 28th of June, 1986, about 12.50 p.m., did you conduct an identification parade?"

It is apparent from this transcript that the trial proceeded without pause after Mr. Frater's withdrawal until it was adjourned for the day at 1612 hours. This was to say the least a most unfortunate incident. The following further incident relevant to this appeal occurred a few minutes later during the examination-in-chief of Inspector Henry:-

"MR. McBEAN: Now, at the parade at Black River on the 18th of February, 1986, - let us go back there - apart from Mr. Shenriff Smith - well, did you see Mr. John Hall on any of those parades that day at Black River?

A. Mr. John Hall?

Q: Yes, at Black River.

A: Yes, sir.

Q: Did he come on any of the parades?

A: Yes, sir, he came on the parade with Errol Dunkley.

Q: With?

A: For Errol Dunkley, sir.

Q: Did he identify ...

since it linked him at the robbery to Robinson who had admitted in his caution statement that he was later present in the morass.

Mr. Mansfield Q.C., for Dunkley, submitted that the withdrawal of Mr. Frater and the conduct of the trial thereafter had caused such prejudice to Dunkley that there was a real risk that a substantial miscarriage of justice had occurred. He referred first to section 20(6)(c) of the Constitution of Jamaica which provides:-

> "Every person who is charged with a criminal offence -
>
> ...
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;"

And to Article 14(3)(d) of the International Covenant on Civil and Political Rights which provides:-

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

He also referred to (1) *Robinson v. The Queen* [1985] 1 A.C. 956 in which it was held that a defendant in a murder trial did not have an absolute right under section 20(6) of the Constitution of Jamaica to representation after counsel had withdrawn in the course of the trial, and (2) the subsequent decision of the Human Rights Committee under the Optional Protocol of the International Covenant on the Civil and Political Rights in Robinson's case [*Robinson v. Jamaica* 30th March 1989 Communication No. 223/1987] to the effect that given the provisions of Article 14(3)(d) of the Covenant it was axiomatic that legal assistance should be available in capital cases and that the absence of counsel constituted unfair trial. Mr. Mansfield argued that in these circumstances a defendant facing a capital charge had an absolute right to legal representation throughout the trial, a proposition which was further developed by Mr. Engelman for Robinson who relied on the fact that the United Kingdom was already a party to both the European and the Universal Declarations of Human Rights prior to the making of the Order in Council which in 1962 created the Jamaican Constitution, as determining the construction which fell to be placed upon the word "permitted" in section 20(6)(c) of the Constitution.

he should consider whether it would be appropriate to adjourn the trial for a cooling off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation. In this case although the judge did not exactly encourage Mr. Frater to withdraw he made no attempt to dissuade him and it does not appear that he considered the possibility of Dunkley trying to obtain alternative representation. Indeed he allowed the trial to proceed as though nothing had happened without even so much as an adjournment until the following morning. Their Lordships can sympathise with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try and secure alternative representation. In the second place, once it had become apparent that Hall was not going to be called by the Crown, counsel for Dunkley should have objected strongly and moved that if he was not called the trial should be stopped and a retrial ordered. Dunkley could not be expected to know that such a motion should be made. Their Lordships do not however consider that the trial judge can be faulted for not giving the jury a specific direction about the Hall statement. He had already stated in front of the jury to counsel for Williams shortly after the statement had been made that not one shred of evidence had been adduced about Hall doing anything at the parade and there was therefore a good deal to be said for the view that he adopted the most sensible course by leaving the matter well alone thereafter. Nevertheless the matter was before the jury and may well have influenced their deliberations. In the third place Mr. Frater's withdrawal deprived Dunkley of the advantage of skilled cross-examination on his behalf of Sharon Rose.

The cumulative effect of these three matters is such as to lead their Lordships to the conclusion that the conviction of Dunkley was unsafe and cannot be sustained. Their Lordships would, however, wish to make it clear that while the facts in this case warrant the foregoing conclusion it by no means follows that the same consequences would flow when the appellant's only complaint was that he had been left unrepresented at some stage in a trial.

Robinson's appeal.

Mr. Engelman advanced two main arguments in support of this appeal:-

into the morass. It is perfectly obvious that the use of the gun in the morass to shoot their pursuers was all part of the common design to rob and thereafter evade capture. The action of Orville Wright in pursuing with a machete was no such overwhelming supervening event as to remove the action of Popsie from the scope of the common design. It follows that the direction of the trial judge in relation to common design was entirely adequate. Robinson's appeal therefore fails.

Before the Court of Appeal Dunkley and Robinson were separately represented. Carey J.A. who gave the judgment of the court, rightly in their Lordships' view, criticised the conduct of Mr. Frater and of the trial judge in telling the former "You may do as you please". The court nevertheless concluded that in all the circumstances the trial judge was justified in not adjourning the trial on the departure of Mr. Frater. It is apparent, however, that the real question addressed to the Court of Appeal on behalf of Dunkley was whether he had been prejudiced by the failure of the judge adequately to assist him in certain specified respects. The Court of Appeal rejected these submissions holding, correctly in their Lordships' view, that while the judge had a duty to secure a fair trial he could not act as defence counsel. The points taken by Mr. Mansfield as to prejudice to Dunkley arising from Crown counsel's statement about Hall and the lack of skilled cross-examination of Sharon Rose on his behalf do not appear to have been taken. In these circumstances it may be that the Court of Appeal would have come to a different conclusion had these points been before them.

Counsel referred to:

(1) Robinson v The Queen [1985] 1 A.C. 956

(2) Robinson v Jamaica [illegible] Communication No 223/1987

(3) Regina v [illegible] [1966] 2 Q.B. 110