Privy Council Appeal No. 64 of 2002

(1) Andrew Hunter and
(2) Marlon Moodie *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 9th July 2003, Delivered the 8th October 2003

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Clyde
Lord Hutton
Lord Millett

*[Delivered by **Lord Hope of Craighead**]*

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1. This is an appeal by special leave from a decision of the Court of Appeal of Jamaica (Forte P, Bingham and Langrin JJA) on 25 October 2001 dismissing the appellants' appeals against their convictions for the capital murder of George Dewar before Smith J and a jury in the Home Circuit Court, Kingston on 22 March 2000. The second appellant, Marlon Moodie, was sentenced to death by Smith J. The first appellant, Andrew Hunter, was less than 18 years old at the time of the commission of the offence. He was sentenced by Smith J to be detained at Her Majesty's pleasure, but his sentence was varied by the Court of Appeal to one of life imprisonment with a recommendation that he not be considered for parole until he had served a period of 20 years.

2. At the end of the hearing their Lordships indicated that, for reasons to be given later, they would humbly advise Her Majesty that the appeals should be allowed, that the verdicts that the appellants were guilty of capital murder should be set aside, that there be substituted in each case a verdict of guilty of non-capital

murder and that in the case of the second appellant a sentence of life imprisonment should also be substituted. They indicated that the cases of both appellants would be remitted to the Court of Appeal to enable that court to fix the period of imprisonment which the second appellant must serve in custody and to reconsider the period of 20 years which was fixed in the case of the first appellant. The following are the reasons which their Lordships now give for their decision.

Capital murder

3. The classification of the appellants' offences as capital murder was based on the provisions of section 2 of the Offences against the Person Act 1864 ("the principal Act"), as amended by section 2 of 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, amongst which there has been included the murder of a member of the security forces acting in the execution of his duties or of a person assisting a member so acting. This is provided for in section 2(1)(a)(i) of the Act. Section 2(5)(a) includes in the definition of the expression "member of the security forces" for the purposes of that section a member of the Jamaica Constabulary Force. George Dewar ("the deceased") was an acting corporal in the Jamaica Constabulary Force, and he was acting in the execution of his duties in that capacity at the time of his murder.

4. In this case, as the Crown sought to prove that each of the appellants was guilty of capital murder, 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."

5. The effect of section 2(2) may be summarised in this way: see *Daley v The Queen* [1998] 1 WLR 494, 501A-B. Where two or more persons are found guilty of any of the categories of murder referred to in subsection (1) – except that referred to in paragraph

(e), which refers to murder committed pursuant to an arrangement whereby money passes as consideration for causing or assisting in causing a person's death – one or other of three additional tests must be satisfied before any 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.

6. As the Board explained in *Daley* at p 501F-G, the purpose of subsection (2) is 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 concert or joint enterprise. It seeks to separate out those whose participation in the murder was on the principle of joint enterprise from those who must answer for their own acts by the imposition of the death penalty. The first two tests are concerned with the person's direct use of violence on the victim – in the one case causing the death by his own act, in the other by inflicting or attempting to inflict on him grievous bodily harm. The third test also indicates that some form of violence directed at the victim is required. Merely to be acting in the course of or furtherance of an attack is not enough.

7. Accordingly, if two men armed with guns are acting in concert and one of them shoots at a member of the security forces acting in the execution of his duties and his shot kills him, that gunman is guilty of capital murder. If the second gunman shoots at the victim but his aim fails and his shot does not strike him, he too is guilty of capital murder. This is because he by his own act attempted to inflict grievous bodily harm on the person who has been murdered. But if the second gunman did not fire any shot at the victim or use any other kind of violence on him in the course or furtherance of the attack, he would not be guilty of capital murder. He too would be guilty of murder if he was found to have been acting in concert with the first gunman. But he would be guilty in that event of non-capital murder only, and not capital murder. It follows that if two gunmen acting in concert confront a member of the security forces, if only one of the two fires at him and no other violence is used on the victim, and if the Crown cannot prove which of them was (to put it in colloquial terms) "the triggerman", neither of the two gunmen can be convicted of capital murder.

8. The Board took the opportunity in *Daley* at p 502C-D to stress that it is necessary for the trial judge in a case where two or

more persons are accused of capital murder, except that of the kind mentioned in paragraph (e) of section 1(1), to give a direction about the application to the case of section 2(2). The advice which the Board gave may be restated, for the purposes of this case, in this way. It is not enough for the judge to give directions to the jury about the law of joint enterprise and as to whether the murder was committed in the circumstances which make it capital murder as set out in subsection (1). The jury must, of course, be invited in a case of that kind to reach a separate verdict for each defendant on the question whether he is guilty of murder. But it must also be made clear to the jury that a separate verdict is required against each defendant as to whether the murder which he committed was capital murder as defined by the statute.

The facts

9. The Crown case was largely based on the evidence of two members of the Jamaica Constabulary Force, Constables Phillip Mitchell and Orlando Milton, who were on mobile patrol with the deceased and one other police officer in the Dunkirk area of Kingston on 5 November 1998. The four officers were in an unmarked service vehicle at about 2.30 pm. They were travelling slowly along Wild Street. They were dressed in plain clothes, but they were wearing vests which were marked "police". Each was armed with a 9mm semi-automatic pistol. Constables Mitchell and Milton said that in the course of their patrol they saw the appellants, who were both known to them, standing on the left side of the road in front of a shop. One of them looked into the shop and as he did so two other men, whom the Constables also recognised by their street names as Stammer and Foreigner, ran from the shop and joined the appellants. All four men then pulled guns from their waists and opened fire on the police vehicle.

10. The police officers alighted from their vehicle and returned the fire, whereupon the four men ran off into nearby premises in Wild Street. Three of the police officers gave chase while the fourth returned to the police vehicle. Constables Mitchell and Milton went onto William Street, and the deceased made his way down Shoe Lane. The appellants were observed trying to exit from premises on to William Street. But, on seeing Constables Mitchell and Milton coming down that street, they pulled back into the premises. They were seen again as they were coming from premises on to Shoe Lane. Constables Mitchell and Milton were now at the mouth of Shoe Lane where it joins William Street. The deceased was moving down Shoe Lane towards William Street and was only about 6 feet away from the appellants as they emerged

from the premises. Constables Mitchell and Milton were about 24 feet away from the appellants and on the other side of them.

11. Constable Mitchell described what happened next. He said that he could see the entire bodies of the appellants when they came out of the premises. They had guns in their hands. They pointed the guns in the deceased's direction and opened fire. He heard loud explosions and saw the deceased fall to the ground. He said that the other two men then emerged from the same premises and that they and the appellants pointed their guns in his direction and opened fire at him. Constable Milton gave a similar description of the incident. He too said that he saw the entire bodies of the appellants as they made their exit from the premises on to Shoe Lane. They pointed their guns in the direction of the deceased and opened fire. He saw the deceased fall to the ground when they did so. The other two men emerged from the same building, and all four then opened fire at him and Constable Mitchell before making their escape down Shoe Lane.

12. The deceased was taken to Kingston Public Hospital where he was found on his arrival to be dead. A post mortem on the deceased was conducted on 9 November 1998. There were two gunshot wounds to the body. One had entered the medial aspect of his left leg and injured vital blood vessels before exiting on the front of his left thigh. The other had penetrated his chin in a downwards direction, entered the neck and travelled through the trachea, the aorta and the right lung before lodging in the right thoracic cavity. The cause of death was found to be the two gunshot wounds, either of which could have caused death. The witness who conducted the post-mortem was unable to say whether a similar calibre bullet was the cause of each of the two injuries or which injury had been inflicted first. A bullet was taken from the deceased's chest cavity. It was larger than a 9 mm bullet and similar to that fired by a .45 calibre weapon. A police officer who examined the scene of the shooting in Shoe Lane found an expended .45 cartridge and five spent 9 mm shells lying on the roadway.

13. Following a search of the area the first appellant, Andrew Hunter, was seen, pursued and apprehended. He was taken to Elletson Road Police Station. He was arrested and cautioned there by Deputy Superintendent Robinson, who said in his statement that upon being cautioned the first appellant replied: "Mr Robinson, me nuh fire no shot. A Marlon dem fire de shot". Following an objection on behalf of the second appellant, Marlon Moodie, the trial judge decided that the name "Marlon" should be omitted from

this reply to avoid the risk of prejudice. The name "Marlon" was substituted by the letter "a" when Superintendent Robinson gave his evidence. The reply which was before the jury, in its amended form, was: "Mr Robinson, me nuh fire no shot. A 'a' dem fire de shot". The second appellant was apprehended on 11 November 1998. He too was arrested by Superintendent Robinson at Elletson Road Police Station. Superintendent Robinson said that, on being charged with the murder and having been cautioned, the second appellant replied: "Mr Robinson, you know say a Stammer kill the police. Mi nuh fire nuh shot". The appellants both gave evidence in support of their defences of alibi. They denied making the statements which were attributed to them by Superintendent Robinson.

The summing up

14. When objection was taken by the second appellant's counsel to the mention of his name when Superintendent Robinson was giving evidence of the first appellant's reply when he had been cautioned by him, the position of the Crown was that the reply should be given in the terms in which it was said to have been made without any editing. Counsel for the Crown, Mr Mahoney, suggested that the safest course was to direct the jury that whatever was said by one accused was evidence against that accused alone. He said that editing of the reply by substituting the words "so and so" for the man's name might provide the first appellant with a ground of appeal to the effect that he had been unduly prejudiced. The trial judge said that the first appellant could not present that argument unless he was relying on his reply as part of his defence. Mr Mahoney replied, at p 248 of the transcript:

> "I understand, my Lord. But well, from my experience, my Lord, they say one thing here and at another level they say another thing, because they would say that even if the jury rejected my case, on the prosecution's case I should not have been found guilty of capital murder because based on what I said to the officer I was there but I did not fire. I did not attempt to inflict grievous bodily harm on Mr Dewar, and accordingly I should have been found guilty of non-capital murder and not capital murder. It could be a ground."

15. The effect of the appellants' replies on the capital murder charge was described with perfect accuracy by Mr Mahoney in this exchange with the trial judge. Their primary defence was the defence of alibi. They denied making the mixed statements which were attributed to them, as they were inconsistent with their defence that they were not present at the scene of the shooting. But

their statements were put before the jury as part of the Crown case. It was for the jury to decide whether the statements were made in the terms spoken by Superintendent Robinson and, if they were, what was to be made of them. It was open to them to regard the incriminating part of each statement as an admission by the appellants that they were there, but to reject the exculpatory part in which they sought to place the blame for the shooting on someone else. It was also open to them to accept both parts, in which event the appellants could not be found guilty of capital murder as none of the tests set out section 2(2) would have been satisfied on that view of the evidence. Or it was open to them to accept both parts of the statement of one appellant and the incriminating part only of the statement of the other, in which event a verdict of capital murder could be returned against only one of them.

16. The clarity with which the matter was explained by Mr Mahoney was not reproduced by the trial judge when he came to his summing up. The critical passage in the summing up, which is set out at pp 647-648, begins in this way:

> "Let me tell you now, to go on to capital murder, what the prosecution must prove – maybe I should tell you this too, that where – and I am telling you a little about what we call common design. Although the prosecution is saying that both fired – but let me tell you something about common design, first. Remember the doctor said either injury would have resulted in death or could have resulted in death. Let me just tell you that where two persons embark on a joint enterprise, each is liable for the act done in pursuance of that joint enterprise.
>
> So what we are saying here, members of the jury, if persons are acting in concert, and pursuant to that agreement, even if one kills, then both would be liable, both would be. If you should find that one kills and this was in pursuance of this common design, then both would be guilty. In other words, the one who didn't fire the firearm could not come and say that, 'No, I didn't fire." Once you find that they were acting in concert – in other words, that he was there aiding and abetting, each person acting together, then it would not matter who fired the fatal shot. Each would be or both would be liable."

17. Their Lordships consider that the trial judge was sowing the seeds of confusion by introducing the issue of joint enterprise in this way, without making it clear at the outset that the question

whether the appellants were guilty of capital murder was an entirely separate issue and that it had nothing whatever to do with joint enterprise. The words "would be guilty" and "would be liable" in the second paragraph of this passage beg the question – guilty of what? The trial judge ought to have said that, on the assumption which he had described, the one who did not fire the firearm could be guilty of non-capital murder only. He ought to have said that a verdict of capital murder would be open to them, on the assumption, only in the case of the one who fired the shot that killed the deceased. He did not do that.

18. The judge did something to clarify this point in the following passage at pp 648-649 (their Lordships have edited the passage in square brackets, in order to make better sense of it in comparison with the confusing way it is set out in the transcript):

> "Now, having said that, let me go on to tell you now about the statutory [provision. The common law principle of guilt, and the basis of common design of persons acting in concert] is preserved, members of the jury, in respect of the crime of murder. But for the crime to amount to capital murder, the Crown must prove that each person caused the death, or inflicted or intended to inflict grievous bodily harm on the person murdered, or himself used violence on the person murdered in the course of or furtherance of attack on that person."

19. The use of the word "intended" before the words "to inflict grievous bodily harm" was inaccurate, as it was a misquotation from the statute. The word which section 2(2) uses is "attempted", not "intended". But the judge had clearly done something in this passage to lay the basis for a careful direction as to how the issues of non-capital murder on the one hand and capital murder on the other should be addressed in the light of the evidence. Unfortunately he did not include such a direction in the concluding passage of this part of the summing up, on p 649:

> "So the prosecution is saying here, that both of them inflicted the injury. We will look at the medical evidence later as to that. All the prosecution is saying, is that at least, even if you should find that one shot missed and only one landed of the two, but that he intended to inflict serious bodily harm – and if you so find – and of course I will remind you of this here too, that you must be satisfied so that you feel sure that the person, that is Mr Dewar, that he was a police officer and that he was killed, as counsel puts it, in the line of duty. Now that is not in issue to the fact.

> Well, as to whether or not Mr Dewar was a police officer is not in issue. Whether or not he was killed in the line of duty, that is not the issue either; but there is evidence led by the prosecution, which if you accept, would lead you to the conclusion that he was a police officer and that he was killed in the line of duty."

20. Here again the word "intended" appears, instead of "attempted". But the judge's reference to the possibility that one shot missed and that only one landed of the two shows that he was proceeding on the assumption that the jury were satisfied that both appellants had fired shots that were aimed at the deceased. What he failed to do in this passage was to explain what their approach should be if they were to find that one or other or both of them had fired "no shot at all", which was what they said in their mixed statements to the police.

21. When he came to deal with the appellants' statements at pp 697-699 of his summing up, the judge reminded the jury of the words used and of the fact that the appellants had each denied saying what had been attributed to them. He reminded them too that Mr Mahoney had asked them to look at each of them as a mixed statement. As he put it, referring to the first appellant's statement:

> "He is saying that he didn't fire but in that statement saying who, so and so, fired, he is saying that he was there. You must say what you make of that interpretation."

Later, referring to the second appellant's statement, he said at p 699 that they had to ask themselves what they were to make of the last part of the statement where the second appellant was said to have said "Mi nuh fire nuh shot":

> "You must first ask yourselves, is he denying that too? You must ask yourselves first, do you believe Supt. Robinson that he said it? If you believe he said it, you as judges of the facts, what do you make of it? Bearing in mind the statement I just read to you."

22. Up to this stage of the summing up the judge had given no indication that he proposed to remove the question of non-capital murder from the jury's consideration altogether. At p 722 he asked counsel whether there was any other bit of evidence or its import that he had not dealt with. Having received a negative reply from each of them and without further discussion, he told the jury that

he proposed to leave two verdicts to them: "either guilty or nor guilty of capital murder". He went on to say this at pp 722-723:

> "Remember the burden of the Crown's case is that these two men fired, and I told you already what murder is, and then for capital murder you have to move on now. If you are sure about murder you move on to say now whether [the] deceased was a police officer in the execution of his duty and whether he was –let me just get it and give you the exact thing, as I told you before. Whether any of them caused the death or inflicted or attempted to inflict grievous bodily harm on him the deceased person, or, used violence on the deceased, that is the person murdered, in the course or furtherance of an attack on that person, either of them, any of these things; and the Crown is saying even if one bullet was fired in an attempt to cause grievous bodily injury, so that is why I am just going to leave capital murder, either guilty or not guilty of capital murder."

23. These directions rendered the direction which he had previously given to the jury about joint enterprise irrelevant. But the judge took no steps to withdraw that issue from their consideration. He did not tell them to disregard that issue as it had no bearing on the question whether the appellants were guilty of capital murder as defined by the statute.

Discussion

24. The appellants' case that their convictions for capital murder should be quashed was presented by Mr Clegg QC on two grounds. The first was that the judge erred in failing to leave for the jury's consideration an alternative verdict of non-capital murder. The second was that his directions as to the application of section 2(2) were inadequate and confusing, having regard in particular to his failure to warn the jury that it was not enough for a verdict of capital murder to find that the appellants had each participated in a joint enterprise. For the Crown it was submitted that the killing in this case was committed in circumstances which rendered the case one of capital murder or nothing at all, as the deceased was a police officer who was in the execution of his duty when he was killed. It was also submitted that the judge's directions on joint enterprise could not have caused any confusion in the circumstances of this case.

25. The answer to the question whether this was a case of capital murder or nothing at all lies in the evidence. It was common ground that there was evidence before the jury, which was not

challenged, that the deceased was a police officer and that he was in the execution of his duty when he was killed. That brought the case within the scope of capital murder, as the terms of section 2(1)(a)(i) of the principal Act, as amended, were satisfied. But the crucial question was whether one or other of the additional tests laid down by section 2(2) of the Act had also been satisfied. There was undoubtedly evidence which would have entitled the jury to hold that each of the appellants had killed the deceased by his own act or that they had each at least attempted to inflict grievous bodily harm on him. This was because Constable Mitchell and Constable Milton said that the appellants both pointed their guns at the deceased and fired shots at him. The incident happened in broad daylight, and they had an uninterrupted view of the appellants when the deceased was shot. On this view of the evidence the "triggerman" test was satisfied in each case, and a verdict of guilty of capital murder would have been inevitable. But the evidence on this issue was not all one way.

26. As Mr Mahoney very properly explained to the trial judge when objection was taken to the evidence of Superintendent Robinson, the mixed statements were each open to the interpretation that the appellant who made it was at the scene of the killing but did not fire a shot at the deceased. There was no ballistic evidence to support the proposition that the deceased was killed by shots from two different guns. Then there was the fact that the other two men, Stammer and Foreigner, who were both armed with guns, were in the immediate vicinity. They emerged from the same building as the appellants just after the deceased, who was only six feet away from them, had been shot. The possibility that one or other or even both of the appellants did not fire a shot at the deceased was not so remote that it would not have been open to the jury to consider it.

27. The approach which the judge took to this issue may well have been influenced by the way the appellants' case was presented at the trial. As he said to Mr Mahoney during the discussion after objection had been taken to Superintendent Robinson's evidence, they were not founding on their statements as part of their defence. But, as Lord Clyde said when he was delivering the judgment of the Board in *von Starck (Alexander) v R* (2000) 56 WIR 424, 429*e-f*, the function and responsibility of the judge is greater and more onerous than the function and the responsibility of counsel. Counsel for a defendant may choose to present his case to the jury in the way which best suits his client's interests. The judge's responsibility is to the interests of justice. It is his duty to leave to the jury all the possible conclusions that may

be open to them on the evidence, whether or not they have been canvassed by the defence.

28. Their Lordships consider that the trial judge was wrong to deprive the jury of the opportunity of considering whether, in the light of the mixed statements, the Crown had proved in the case of each appellant that the "triggerman" test was satisfied. He ought to have directed the jury to consider this question, and to have left with them the alternative verdict that the appellants were guilty of non-capital murder which would have been open to them on the evidence if they were satisfied that the appellants were acting in pursuance of a joint enterprise. They were, of course, left with the alternative verdict of not guilty. But, as Lord Ackner explained in *R v Maxwell* [1990] 1 WLR 401, 408, if the judge fails to leave an alternative offence to the jury, the court must consider whether the jury may have convicted out of a reluctance to see the defendant get clean way with what, on any view, was disgraceful conduct. That was a very real possibility in this case. There was ample evidence that the appellants had guns in their hands, and that they had been using them during their running battle which they and their companions had started with the police. According to the police witnesses, all four men had been attempting to inflict grievous bodily harm on them from the start of this incident.

29. The case for setting aside the verdicts of capital murder is made even stronger by the confused and misleading way in which the trial judge dealt with the issue of joint enterprise. The Director of Public Prosecutions, Mr Pantry QC, in his careful address to the Board, submitted that the amendments which were made to section 2 of the principal Act by the 1992 Act did not have the effect of relieving the trial judge of the need to deal in his summing up with all the issues that were relevant to murder, including the issue of joint enterprise. What it did was introduce additional ingredients to which the jury would have to address their minds if they were satisfied that the ingredients of murder had been proved. He submitted that the trial judge had addressed these issues in the correct order and made it sufficiently clear, having dealt in the context of murder with the issue of joint enterprise, that he was then moving on to capital murder as a distinct issue. The way in which he dealt with the mixed statements was intended to assist the jury having regard to the line which had been taken about them by the defence.

30. Their Lordships accept, of course, that the amendments which were introduced by the 1992 Act did not have the effect of relieving the trial judge from the responsibility of dealing first with

the issue of murder, and with all questions relevant to that issue that have been raised by the evidence, before he comes to deal with the question whether the defendant is guilty of capital murder. But the issue of joint enterprise has no part to play in a charge of capital murder. On the contrary, the additional tests which are set out in section 2(2) of the principal Act, as amended, make it abundantly clear that each defendant is answerable only for his own actions in that context. He is not answerable for anything that may have been done by his co-accused. So great care must always be taken to keep the issue of joint enterprise as to non-capital murder and the issue of capital murder entirely separate.

31. The trial judge failed to achieve this separation in his summing up. He caused further confusion when, having withdrawn from them the verdict of murder to which alone the issue of joint enterprise was relevant, he failed to direct the jury that they must entirely disregard what he had said on that issue. By failing to do this he compounded the risk of a miscarriage of justice which was already inherent in his decision to restrict the jury to the verdicts of guilty or not guilty of capital murder only. Their Lordships consider that the verdicts of guilty of capital murder cannot stand in these circumstances. Mr Clegg accepted that a verdict that the appellants were both guilty of non-capital murder should be substituted.

32. The Director did not ask for the case to be remitted to the Court of Appeal to consider whether there should be a new trial. In these circumstances their Lordships will humbly advise Her Majesty that the convictions for capital murder should be quashed and convictions for non-capital murder substituted, and that the case should be remitted to the Court of Appeal so that the court may consider, in the light of the appellants' convictions for non-capital murder, what is the appropriate period of their life sentences that they must each serve in custody.