Privy Council Appeal No 81 of 2008

(1) Hayden Jackson
(2) Addis Jackson
(3) Altimont Jarrett *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 7th July 2009

Present at the hearing:-

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Collins of Mapesbury
Sir Christopher Rose
Sir Henry Brooke

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*[Delivered by **Lord Rodger of Earlsferry**]*

1. In October 2001 all three appellants stood trial, before Justice W James and a jury in the Circuit Court for the Parish of St Ann, for the murder of Clinton Miller in the grounds of St Ann's Bay Hospital on 11 March 2000. They were convicted and sentenced to life imprisonment. Their applications for leave to appeal against their convictions and sentences were dismissed by the Court of Appeal on 26 February 2004. The court ordered that their sentences should run from 10 January 2002. It appears that the appellants were not represented before the Court of

Appeal and that the court delivered an oral judgment which was not recorded. It can only be assumed that, in the absence of any professional representation, the court was satisfied that there had been no miscarriage of justice.

2. There was, unfortunately, a long delay between the judgment of the Court of Appeal and the lodging of the petitions for special leave to appeal to the Board as poor persons. The petitions were eventually heard in January 2009 and Her Majesty made the formal order granting special leave to appeal on 11 February 2009. Their Lordships are only too well aware of the difficulties which people in the appellants' position experience in finding solicitors and counsel who can mount an appeal before the Board. Nevertheless, they can only express their dismay at the delay of almost 5 years – coupled with their gratitude for the assistance provided, both at and after the hearing, by agents and counsel on both sides.

3. The first appellant, Hayden Jackson, is the father of the second appellant, Addis Jackson, and the stepfather of the third appellant, Altimont Jarrett. Although all three appellants were represented by the same agents and counsel both at trial and before the Board, for reasons which will become apparent, the position of Addis Jackson differs in an important respect from the position of Hayden Jackson and Altimont Jarrett.

4. Mr Bompas QC advanced three grounds of appeal before the Board. The first was to the effect that the trial judge should have given the jury a special warning about the need for caution in accepting the evidence of Dane Miller, the principal witness for the Crown. The second was that the trial judge's directions on the law and, more particularly, on the law of joint enterprise were radically defective. The third was that evidence of the appellants' good character should have been led and the judge should have been asked to give an appropriate good character direction. Since this last point was raised for the first time before the Board, as their Lordships have emphasised on a number of occasions, e g in *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421, 2432-2433, paras 38 and 39, they would have been reluctant to entertain it. In the event, however, they do not find it necessary to consider either the first or the third ground of appeal since they have concluded that the appeals should be allowed on the basis of the second ground of appeal, to which they now turn.

5. The murder of Clinton Miller occurred outside St Ann's Hospital, but the relevant events began some time earlier that morning. Clinton Miller ("the deceased") and his son, Dane Miller, were neighbours of a

Mrs Nicie, who was Hayden Jackson's mother, Addis Jackson's grandmother, and, through Hayden Jackson, Altimont Jarrett's grandmother or step-grandmother. Dane Miller was sitting in the yard of his house when Mrs Nicie began cursing him about ripe ackee leaf that had fallen from a tree. After this had been going on for a little time, Altimont Jarrett and the two Jacksons came into the yard where Dane Miller was. There was evidence that the Jacksons were armed with machetes or cutlasses and that Hayden Jackson had a shovel in his hand. The appellants started to "rush" Dane Miller and he was hit on the right hand with the shovel. He took up a small hand axe to defend himself. In the ensuing struggle, he cut each of the appellants with the axe. The deceased appeared on the scene, apparently with a piece of lead pipe, about the time when the incident began to subside as the police arrived.

6. The appellants were placed in a police car which took them away. The police officers told Clinton and Dane Miller to walk to the police station. On arriving there, they were told to go to the hospital since Dane Miller's hand had swollen up. They set off to walk to the hospital and, when they were passing through the market area, Addis Jackson's girlfriend pointed Dane Miller out to friends, who then began to follow him. One of them drew a cutlass and "juked" (stabbed) him in the back. (The injury does not appear to have been particularly serious.)

7. The two Millers arrived at the hospital at about 9.30 am and went to the outpatients' department. In his evidence in chief at the trial Dane Miller said that, when they arrived at the hospital, the appellants were already there. His evidence on this point was challenged in cross-examination as being inconsistent with what he had said in a handwritten deposition signed by him before the Resident Magistrate on 8 September 2000. The deposition was not available at the hearing of the appeal, but was eventually provided to the Board some weeks later. It appears to confirm that in his deposition Dane Miller described the appellants and some others arriving by car at a time when he and his father were already in the outpatients' department. In other respects the deposition is less favourable to the appellants, but they are not relevant for present purposes.

8. According to Dane Miller, Hayden Jackson and Altimont Jarrett approached the Millers, as did Addis Jackson. The appellants and three others pulled the Millers from the outpatients' department and out of the hospital building. The Millers started to run away but Clinton Miller fell and the appellants and three others began to beat him with cutlasses. Hayden Jackson hit him on the head with an iron pipe. According to Dane Miller, the attackers were "chopping" at Clinton Miller when he was on the ground. "Then Addis run come and stab him in his chest"

with a "long knife". When Dane Miller tried to help him, one of the other attackers, named Bull, stabbed him in the back. The attackers ran off. Clinton Miller appears to have died at the scene.

9. Mr Casey, counsel for the Crown before the Board, accepted that there was no evidence to show that Hayden Jackson or Altimont Jarrett, or indeed any of the others who were attacking the deceased, knew that Addis Jackson (or anyone else) had a knife.

10. The Crown led the evidence of Dr Noel Black who carried out a post-mortem on 27 March, some sixteen days after the murder. On the basis of the report which he had prepared at the time, Dr Black testified that he had found an incised wound about 2 inches below the left collar bone and about 1¼ inches long. The deceased's aorta had been severed and so the wound must have been very deep and the force used to produce it must have been severe. Blood had haemorrhaged into the pleural cavity and so caused death. The skin colour of the body was black and Dr Black did not record any other injuries – the inference being that he did not observe any. A police officer, Leslie Lawrence, who had been present at the post-mortem, gave evidence, however, that she had noticed an injury about six inches long on the deceased's leg: "It look like he get a lick … I saw, like when you lick somebody – like when a person get a hearty lick and a settling of blood here."

11. It was, of course, common ground before the Board that, for a conviction of murder, the Crown has to prove that the person who struck the fatal blow did so with the intention to kill or to cause serious injury. Both parties also accepted that, for present purposes, the most up-to-date guidance on the law of joint enterprise was to be found in the speech of Lord Brown of Eaton-under-Heywood in *R v Rahman* [2009] 1 AC 129, 165, para 68:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

12. Here, on the evidence of Dane Miller, the attack on the deceased went on for some time, during which the assailants were striking blows with cutlasses or machetes and with a lead pipe. While, as already noted, at one point he referred to the assailants "chopping" at the deceased, he began his account of the attack which led to his father's death by saying that "Them start to beat him." The word "beat" was the one which he generally favoured in describing what happened.

13. The force of Dane Miller's evidence has to be evaluated in the light of the fact that, even if Leslie Lawrence's evidence about the post-mortem was reliable, there was only one visible injury to the deceased's body (like the result of a hearty lick) apart from the fatal stab wound. The only plausible inference is, accordingly, that the attackers were using the flat of the blade of their cutlasses or machetes to "beat" the deceased. That is certainly how the trial judge understood Dane Miller's evidence since he repeatedly refers to the assailants "beating" (as opposed to "chopping") the deceased.

14. The facts that they were using the flat of the blades and that so little by the way of injury to the deceased was actually inflicted by those blows make it difficult to draw the inference that the attackers (apart from the one who carried out the stabbing) intended to cause serious bodily harm or that any individual attacker would have realised that any other participant might kill or intentionally inflict serious injury on the deceased. While it is therefore unnecessary for the Board to reach a conclusion on the point, their Lordships incline to the view that, given the way that only the flat of the machete blades was being used, the long knife was indeed a "more lethal weapon" and the stabbing was "fundamentally different" from anything foreseen by the other participants.

15. At the best for the Crown, the jury would have required to be given careful directions on these matters. Instead of this, however, in his summing up the trial judge failed to give any coherent directions on joint enterprise. Although he returned to the theme on various occasions, he never drew his directions together. Worse still, at an early point in his summing up, the judge summarised the issue for the jury in this way:

> "Is Dane Miller talking the truth when he said that these men and some others draw out himself and his father, his father ran and fell, one of them stabbed him in the chest: that is the case? If you believe that it happened that way, then all three of them will be guilty of murder, all three."

That is a patent misdirection. To make matters even worse, the misdirection was really repeated towards the end of the judge's summing up when, referring to Dane Miller's evidence, he said:

> "They were where they say they were. But when their cronies or their companion came and they were outside, they drew out himself and his father. Father shove them off and ran. He fell, was beaten and stabbed. That is the case. And if you believe that, you may well find that there is evidence of murder"

The judge then went on to refer to the possibility of a verdict of manslaughter by virtue of provocation arising out of the incident in which the appellants had been cut by Dane Miller earlier that morning.

16. In another passage, when referring to the point made by counsel for Addis Jackson, that it was hard to see how he could both have run at the deceased and stabbed him with a long knife and also have been engaged in beating him with a machete, the judge said:

> "I don't know, it is a matter for you, but I don't see any problem with that. All he would have to do is withdraw from the beating and go for his knife."

However plausible that explanation of a possible difficulty in the evidence might be, it introduces the idea that the person who did the stabbing would previously have withdrawn from the common beating – which is hard to reconcile with the other participants being convicted of the murder by stabbing on the basis of a joint enterprise.

17. In the light of these serious misdirections it is plain that the appeals of Hayden Jackson and Altimont Jarrett, whose convictions can only have been based on joint enterprise, must be allowed. Moreover, having considered the position for themselves, their Lordships cannot find any evidence which would have justified a jury in concluding, beyond reasonable doubt, that the participants in the incident (apart from the one who carried out the stabbing) had intended to cause serious bodily injury to the deceased or had participated in the attack while realising that any of the others might kill or intentionally inflict serious injury. In this respect the Crown concession that there was no evidence to show that Hayden Jackson or Altimont Jarrett knew that anyone was carrying a knife is particularly important.

18. For these reasons no question of a retrial arises in the cases of Hayden Jackson and Altimont Jarrett. Their Lordships will accordingly humbly advise Her Majesty that their appeals should be allowed and their convictions quashed.

19. The position of Addis Jackson is different. In his account of the incident Dane Miller identified Addis Jackson as the person who had the knife and stabbed the deceased. Given the depth of the stab wound and the evidence that severe force would have been required to inflict it, it would undoubtedly have been open to the jury to conclude that the person who carried out the stabbing intended to kill or to cause serious bodily harm. If, therefore, the jury accepted Dane Miller's evidence that it was Addis Jackson who carried out the stabbing, they could undoubtedly have convicted him of murder – subject to the issue of provocation which the trial judge explained to the jury.

20. Despite this, the Board has come to the conclusion that, in his case also, the appeal against conviction should be allowed – largely because, in giving his directions to the jury, the trial judge did not really differentiate Addis Jackson's position clearly from the position of the other participants in the attack. That is understandable, given that all three defendants had been represented by the same counsel who would not have stressed the difference. It is therefore at least possible that, on the basis of the misdirections on joint enterprise to which the Board has already referred, the jury convicted Addis Jackson without considering whether they accepted Dane Miller's evidence identifying him as the person who actually stabbed the deceased. Given that Dane Miller's evidence was not free from difficulties in certain respects, including the apparent conflict with his deposition made the previous September, the Board does not feel able to conclude that the jury would inevitably have accepted his evidence on this point.

21. In these circumstances the Board will humbly advise Her Majesty to remit the case of Addis Jackson to the Court of Appeal of Jamaica, with a direction that his appeal should be allowed, that his conviction should be quashed and that the court should then consider whether to order a retrial, the appellant remaining in custody in the meantime.